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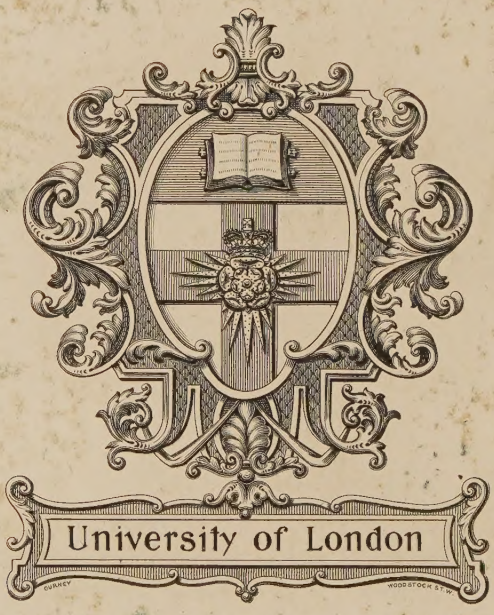

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

WELSBACH INCANDESCENT GAS LIGHTING COMPANY *v.* NEW SUNLIGHT INCANDESCENT COMPANY.

C. A. 1900 *May* 16.

[1899 W. 2464.]

Practice—Interrogatories—Answer by Officer of Corporation—Rules of Supreme Court, Order XXXI., *rr.* 1, 5, 24.

An officer of a company, answering on their behalf interrogatories administered to them in an action, is only bound to answer as to his knowledge acquired in the course of his employment by the company, and as to the result of inquiries made by him of the other officers and agents of the company with regard to their knowledge acquired in the same way.

He is not bound to answer as to his own knowledge, or to make inquiries of the other officers or agents of the company as to their knowledge, acquired accidentally or in some other capacity.

The answer of an officer of a company on their behalf, being their answer, can be read against them, and they can only be required to answer as to that with respect to which an individual litigant in their position would have been bound to answer.

APPEAL against an order of Byrne J. that the plaintiff company should file by their secretary a full and sufficient affidavit in further answer to interrogatories which had been delivered for their examination by the defendants.

The action was brought to restrain the alleged infringement

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by the defendants of the plaintiffs' patent No. 124 of 1893. The patent had belonged to a company called the Incandescent Gas Light Company, and that company in December, 1897, transferred their undertaking and property (including the patent) to the plaintiff company, which was incorporated on December 9, 1897.

Some of the directors and officers of the plaintiff company had been directors and officers of the Incandescent Company.

The defendants delivered particulars of objections, one of which was—"The alleged invention was not novel, having been made, used, exhibited, and sold in this realm prior to the date of the said patent. The defendants will rely upon (inter alia)—

"(*a*) Manufacture, exhibition, use, and sale of mantles made according to the alleged invention by the plaintiffs' predecessors in business, the Incandescent Gas Light Company, from time to time during the years 1891 and 1892."

For the purpose of establishing the truth of this objection the defendants obtained an order giving them liberty to deliver interrogatories for the examination of the plaintiffs, which were to be answered by their secretary. Interrogatories were accordingly delivered asking for information as to the process of manufacture employed by the Incandescent Company in the years 1891 and 1892.

The plaintiffs' secretary made the following affidavit in answer to the interrogatories:—

"(1.) The whole of the matters inquired into refer to events which occurred prior to the incorporation of the plaintiff company and in respect of matters as to which I have no personal knowledge whatever. I have made inquiries of the directors, officers, servants, and agents of the plaintiff company as to what knowledge they had acquired in the course of their employment as directors, officers, servants, or agents of the plaintiff company with regard to the matters inquired of by the said interrogatories, and I have been unable to obtain any information thereon whatever, the said directors, officers, servants, and agents informing me that as such directors, officers, servants, and agents they possessed no

knowledge whatever of the matters inquired of by the said interrogatories.

"(2.) I have been advised and believe that I am not bound for the purpose of answering these interrogatories to make inquiries of any persons who may happen to be at the present moment directors, officers, servants, or agents of the plaintiff company as to any knowledge or information they may possess accidentally not in the course of their employment by the plaintiff company and not in the ordinary course of their business as such, and I have, therefore, not made such inquiries.

"(3.) Subject to paragraph 2 hereof I have not, nor, to the best of my knowledge, information, or belief, has any director, officer, servant, or agent of the plaintiff company, any knowledge or means of information which would enable me or them to answer the said interrogatories or any of them."

The defendants objected to the sufficiency of this affidavit, and applied for an order that the plaintiffs should make a further affidavit.

Byrne J. held that the affidavit was insufficient, and made the above-mentioned order. In his opinion the secretary ought to have made inquiries of the directors and officers, &c., of the company as to knowledge which they had acquired when they were directors, &c., of the Incandescent Company. There was nothing to shew that these persons had refused to give such information.

The plaintiffs appealed.

Moulton, Q.C., *T. Terrell, Q.C.*, and *A. J. Walter*, for the plaintiffs. It is submitted that an officer of a company, in answering on their behalf interrogatories administered by their opponents in litigation, is only bound to answer as to his personal knowledge acquired by him as the officer of the company, and to make inquiries of other officers and agents of the company as to their knowledge acquired by them as such officers and agents. He is not bound to answer as to his own knowledge acquired in some other way, or to make inquiries of other officers and agents as to their knowledge acquired in some other character. The answer of the officer is the answer of

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the company, and it may be read against them: Order XXXI., r. 24. (1)

It might be a serious matter for a company if they were bound by the answer of their officer with regard to something which had come to his knowledge casually, and not in the course of his employment by the company. Byrne J. based his decision mainly on *Wilson* v. *Church*. (2) Under the old practice of the Court of Chancery, when discovery was wanted from a corporation, an officer of the corporation was made a defendant for the purpose of obtaining discovery. But that practice was abolished by the Rules under the Judicature Act. The point now raised has never yet been actually decided, but on principle it is submitted that the decision of Byrne J. is erroneous. An individual could not be asked about what took place before he was born, and in the same way a company cannot be asked about what happened before it came into existence. There are several dicta which support the view that an officer of a company can only be asked as to what came to his knowledge as their officer. In *Chaddock* v. *British South Africa Co.* (3) the judgment of Lord Esher M.R. shews that the officer is interrogated because he is acquainted with the company's affairs. And in that case A. L. Smith L.J. said (4) that when a member of the company is ordered to answer interrogatories on their behalf "his answers will in that case bind the company." In *Bolckow, Vaughan & Co.* v. *Fisher* (5) it was

(1) Order XXXI., r. 5: "If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly."

Rule 24: "Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

(2) (1878) 9 Ch. D. 552.

(3) [1896] 2 Q. B. 153.

(4) Ibid. 158.

(5) (1882) 10 Q. B. D. 161.

held that a party was not excused from answering relevant interrogatories on the ground that the matters inquired about were not within his own knowledge, but only within the knowledge of his agents or servants, if it was derived in the ordinary course of their employment, and that he was as a general rule bound to obtain the information from them. In that case Brett L.J. said (1): "I think, however, that he would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business." And Lindley L.J. said (2): "The knowledge of the defendant's servants and agents obtained by them in the course of their employment is his knowledge." In *Rasbotham* v. *Shropshire Union Railways and Canal Co.* (3), North J. held that a party interrogated was not bound to say that he had made inquiries of the persons in his employment when there was nothing to shew that the acts referred to were done in the presence of persons employed by him. In *Southwark and Vauxhall Water Co.* v. *Quick* (4) Cotton L.J. (5) said that "the directors of a company, in answering interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question." No case can be found in which an officer of a company has been ordered to answer as to matters which came to his knowledge outside his employment by the company. He might no doubt be called as a witness by the other side, but then the company could cross-examine him. In *Berkeley* v. *Standard Discount Co.* (6) Jessel M.R. said (7): "the person interrogated is making discovery on the part of the company."

[WEBSTER M.R. Must you not go to this extent, that if the secretary of the company had himself acquired knowledge of the matters in question as secretary of the old company, he would not be bound to answer as to that knowledge?]

(1) 10 Q. B. D. 169.
(2) Ibid. 171.
(3) (1883) 24 Ch. D. 110.
(4) (1878) 3 Q. B. D. 315.
(5) Ibid. 321.
(6) (1879) 13 Ch. D. 97.
(7) 13 Ch. D. 99.

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No doubt we must do so in order to justify the answer of the secretary. But that is in accordance with what Brett L.J. said in *Bolckow, Vaughan & Co.* v. *Fisher.* (1)

Bousfield, Q.C., and *W. Neill*, for the defendants. The only authority cited for the plaintiffs is some observations of the judges in *Bolckow, Vaughan & Co.* v. *Fisher* (2), where the present point did not arise for decision. In *Manchester Val de Travers Paving Co.* v. *Slagg* (3) both Jessel M.R. and Cotton L.J. declined to express an opinion as to whether an answer to interrogatories given by an officer or member of a company could be read against the company. And in *Chaddock* v. *British South Africa Co.* (4) A. L. Smith L.J. was the only judge who expressed an opinion on that point.

[WEBSTER M.R. If the answer is not to be treated as an admission by the company, of what use would it be to you?]

It might be of the greatest importance in the conduct of our defence: *Wych* v. *Meal.* (5) In that case the Lord Chancellor said that the answer of a defendant, the officer of a company, could not be read against the company. Rule 24 will not bear the construction that the answer of an officer of a company to interrogatories can be read against the company. An answer is no more an admission now than it was under the old practice.

[WEBSTER M.R. Suppose an individual owner of a patent was suing for its infringement, and it was set up against him that the person who had sold the patent to him had used the invention before the patent was granted, would the plaintiff, when he was interrogated as to this, be bound to find out whether his vendor had done this?]

It is a matter within the discretion of the Court which officer or member of a company shall be selected to answer interrogatories on their behalf. The Court would not select a person who had an interest adverse to that of the company. In *Bolckow, Vaughan & Co.* v. *Fisher* (2) the employer was dealing with mere servants or agents, over whom he had no control except in that character.

(1) 10 Q. B. D. 169.
(2) Ibid. 161.
(3) W. N. (1882) 127.
(4) [1896] 2 Q. B. 153.
(5) (1734) 3 P. Wms. 310.

[COLLINS L.J. referred to *Moline* v. *Tasmanian Ry. Co.* (1)]

The question really is whether we can compel a disclosure by the former directors of the Incandescent Company of that which they knew when they filled that position.

[RIGBY L.J. Ought a director who acquired knowledge before the company came into existence to be compelled to answer as to that knowledge?]

A partner could not refuse to answer as to what took place when he was a partner in a former firm. A member of a company is a quasi-partner in the company: *Berkeley* v. *Standard Discount Co.* (2)

The secretary of a company might be hostile to the company, and he might give an untrue answer: ought the company in such a case to be bound by his answer? The old practice as to the answer of an officer of a corporation has been altered only by making it unnecessary to add the officer as a defendant to the action. Under the old practice the answer of an officer thus made a defendant could not be read against the company: *M'Intosh* v. *Great Western Ry. Co.* (3); *In re Barned's Banking Co.* (4)

T. Terrell, Q.C., in reply.

WEBSTER M.R. This case raises an important and in some respects a novel point.

The appeal is from the decision of Byrne J. that the answer of the secretary of the plaintiff company to the defendants' interrogatories is insufficient. The main point of principle is raised by paragraph 2 of the answer. [His Lordship read paragraph 2, and continued:—]

The question, therefore, is whether the officer of the company who has been ordered to answer interrogatories is bound to make inquiries as to the knowledge of those persons from whom he ought to seek information as to the affairs of the company with regard to matters which are outside those affairs and which may have taken place before the company was incorporated.

(1) (1875) 32 L. T. 828.
(2) 13 Ch. D. 97.
(3) (1851) 4 De G. & Sm. 544.
(4) (1867) L. R. 2 Ch. 350.

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Webster M.R.

It may perhaps be convenient, in order that my judgment may be understood, that I should state a little more specifically the actual way in which the point is raised. The plaintiff company was incorporated to purchase—or at any rate did purchase—one of the incandescent light patents. This patent had previously belonged to the Incandescent Company, the vendors, and among the officers of the plaintiff company were some who had previously been in the employment of the Incandescent Company, and it is suggested by the particulars of objections which the defendants have delivered in this action for the infringement of the patent that prior to the date of the patent the patented invention had been worked by the plaintiffs' predecessors, the Incandescent Company. It will, therefore, no doubt be a material matter for discussion when the action comes to be tried whether that allegation is true.

In my opinion, Byrne J. has gone too far. I think that in substance the objection taken by the secretary of the plaintiff company is well founded, and that, assuming him to have honestly made investigation as to the affairs of the company, he is not bound to inquire as to things which happened before the company was constituted, or as to matters which came to the knowledge of the plaintiff company's servants otherwise than in the capacity of servants of the plaintiff company. In the arguments which have been addressed to us a great deal has been said about the old practice of the Court of Chancery. Speaking for myself, I do not think there is very much difference between the practice as it now stands and the practice as it existed before the Judicature Act. When an order is made upon a company to answer interrogatories, some officer of the company has to answer them, and the Court unquestionably has a discretion to say who shall make the answer, and in the exercise of that discretion the Court would, in my opinion, choose that officer who of his own knowledge knew most about the matters as to which the company was being interrogated. But the matters about which he is being interrogated still ought to be such as relate to the business of the company, and while I should apply to such an officer the rule which has been laid down in other cases with regard to the duty of

answering to the best of his knowledge, information, and belief, still that must be knowledge, information, and belief as to the affairs of the company, and not as to any other affairs. There are not, I think, any words in any of the rules of Order XXXI. which expressly decide the present question. Rule 24 was much relied on by Mr. Terrell. It says that, "Any party may at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories," reserving to the judge a discretion as to the use of the rest. In my judgment that rule is directed only to the use which can be made of the answer when it has been filed on behalf of a party. I do not think those words were intended to determine the present question; I think the solution of that question must rest upon this broad ground: What is the real position of a person who has to answer an interrogatory? It seems to me that, whether it be an individual who has to obtain information from his servants, or a company which answers by its secretary or manager, who has also to obtain information from other officials of the company, the reason why the answer can be read against the party interrogated is that, when it has been given according to the principle which I have indicated, it is a statement on behalf of that party by which he is bound. I do not mean that a case might never arise in which a person answering on behalf of a company could not protect himself in some way by the form of his answer. But, taking it as a statement of fact, I think the answer is intended to be an admission by the person who makes it, or at any rate a statement by which under ordinary circumstances he will be bound. It was said by Mr. Bousfield that the defendants did not want to take the answer as an admission by the plaintiff company, but they were content to take it as giving them information and not as being a statement by the plaintiffs. I am not myself aware of any case which has contemplated answers to interrogatories being framed in that way. It seems to me that it might lead to a very dangerous practice, for it might thus enable a person to obtain the benefit of hearsay evidence, or of evidence which would not be admissible before the Court,

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because he had forced a company through their officer to make an inquiry the result of which would shew that the evidence had proceeded from third parties. I should, I think, have come to this conclusion in the absence of any previous authority, and I am not sure that it can be said there is any absolute authority on the point. But I think the opinion of Smith L.J. in *Chaddock* v. *British South Africa Co.* (1) (which coincides with the view I am expressing) ought certainly not to be lightly disregarded. He said (2): "I think the meaning of Order XXXI., r. 5, must be that, if the judge thinks that a member of a company is in such a position with regard to the company that he is a proper person to answer the interrogatories on their behalf, he may order him to do so, and that his answers will in that case bind the company." Certainly, as I understand the old practice, it depended to a large extent upon the theory that the person answering had to search his conscience and answer in reference to the matter inquired about, so that the statements made by him would be binding upon him, and although it is quite possible that Brett L.J. and Lindley L.J. in *Bolckow, Vaughan & Co.* v. *Fisher* (3) may not have had this particular point in their minds, still it is to be noted that they speak of a person being bound to answer as to what is known to his servants or agents in the ordinary course of business, and not as to that which is known to them accidentally, and not in the ordinary course of business. It seems to me that the principle which lies at the root of the distinction is this—that you are intended to get the answer of the party through the knowledge of those persons for whose knowledge he is responsible, and that you are not intended to use interrogatories or the answers to them merely as a channel of information which would not be binding upon the party by whom it was produced, but which might in some indirect way be of advantage to the persons by whom the questions have been administered. If I could have seen that some use could be made of a further investigation by the plaintiffs' secretary, which would have brought his answers within the Rules, I should have

(1) [1896] 2 Q. B. 153. (2) [1896] 2 Q. B. 158.
(3) 10 Q. B. D. 161.

been disposed to require a further answer to be given. But it seems to me that a question of principle is clearly raised, and, for the reasons which I have given, I think the judgment of Byrne J. went too far, and that the appeal ought to be allowed.

RIGBY L.J. In my opinion there never was any principle or rule that larger discovery could be obtained from an incorporated company than could be obtained from an individual. There was for a long time what I may call a makeshift endeavour to obtain as far as possible the same kind of discovery on oath from a company as was obtained from an individual. What is the correct conclusion from the practice and the authorities as regards an individual? Could you insist upon an individual defendant going out of his way to collect evidence for the plaintiff? Certainly not. An individual who chose to have his affairs transacted by servants and agents could not himself by reason of his ignorance disclose what he would have been obliged to disclose if he had managed his affairs himself, and therefore it was incumbent upon him to inquire of those who had acted for him what they knew about the matter in the course of their employment by him. But he was not obliged to ask or to answer as to any knowledge which his servants or agents had happened to acquire outside the course of their employment by him. This, I think, is sufficiently illustrated by *Bolckow, Vaughan & Co.* v. *Fisher* (1), and I understand it to be the rule of the Court.

Coming then to the case of a corporate body, the first idea was to make a proper officer of the corporation a party to the suit and to obtain discovery from him. It is unnecessary to go into the history of that practice; but it became an established rule in the Court of Chancery that you might make the proper officer of a corporation a party to the suit in order to obtain from him discovery; but he was not bound to give discovery on any principle other than that which would apply to any other party. The important result was that you obtained discovery from him on oath; but his answer when made stood in exactly

(1) 10 Q. B. D. 161.

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the same position as the answer of any other defendant, and among other things it could not be read as evidence against his co-defendant, the corporation. By degrees we have departed from that practice, and in *Wilson* v. *Church* (1) it was laid down that the old practice had gone entirely. The present practice is to obtain an order against the corporation that they do put in an answer to interrogatories by their secretary, or other proper officer whoever he may be, and I do not see how it is possible to avoid the conclusion that the answer so made by the corporation can be read against them. It therefore becomes very important that such an officer should not include in his answer, or be bound to inquire into, matters about which the corporation, if they had been individuals, would not have been bound to trouble themselves—that is, the knowledge of outsiders, or the knowledge even of their own servants, if it were acquired by them otherwise than in the course of their employment by the corporation. I cannot say that the answer would not be capable of being read against the corporation. I will not say that it would be absolutely and in all cases binding upon the corporation, for if they could make it clear that any of the answers given were mistaken or otherwise wrong, I cannot say that they would not be at liberty to do so. But it seems to me that the officer in acquiring the information which he is bound to disclose stands in the same position as any private individual acting for himself in his own business, and is not bound to go any further. I think, therefore, that this order of Byrne J. that the secretary do put in a further answer, meaning, as I understand it, that he must inquire of all the officers of the company who, by accident and apart from the course of their employment by the company, have obtained any knowledge of the matters in question, collect that information from them and insert it in his answer, is not founded on the right principle, and ought to be discharged.

But it is said, you are always entitled to interrogate the person who knows about the matters in question. Within proper limits, that is no doubt the right principle. If, for instance, you are inquiring into the details of a manufacturing

(1) 9 Ch. D. 552.

process, it would be idle to say you should go to the secretary of a company who probably would not know one process from another in the manufactory, when there may be an important officer or manager of the manufactory who could give you reasonable and plain answers. But I do not think that, because you may suppose from surrounding circumstances that a man who happens to be an officer of the company will also be able to tell you the truth about a particular matter, this will make him the proper officer to be interrogated, and, above all, I do not think you can go from one officer to another. You have had an answer from the secretary, and that ought to satisfy you. It may not contain everything which you want; but, if it contains all to which you are entitled, you cannot then go to other persons and ask them what they know about the matter, independently of the mode in which they acquired their knowledge. Indeed, I do not see that you are entitled to any answer from them. The secretary's answer in this case seems to me to fulfil all the objects of an answer: it gives the defendants as much as they would have been entitled to if the plaintiffs had been individuals, and there the duty of the Court ends. The answer is in my opinion sufficient, and no further answer should be required.

Some argument has been based on the theery that the plaintiffs are a quasi partnership. I think the plain answer is that they are not a partnership. They are a corporation. No doubt if you want to determine the rights of the shareholders among themselves, you may say that company law is based upon partnership law, and then see how that law can be adapted to a company. But that does not give a party to an action any right to obtain any further or other discovery from a company than he would have been entitled to if the company were treated as a corporation without any reference to the law of partnership.

COLLINS L.J. I am of the same opinion; but as this is a matter of some importance, and we are differing from the learned judge below, I will add a few words.

I think that when once it is realized that the answer is the

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answer of the company, and not of the individual who gives it, the difficulty is solved. Under the present practice at any rate the answer of a company stands on precisely the same footing as the answer of an individual: in either case it is an admission by the party who makes it (in the present case the company), and, being an admission, it can be read against that party. It is idle to suggest that the admission may be qualified: that is not ad rem. The question is, Does the answer come under the category of admission? If it does, it can be read against the party who makes it with all the suggestions sinister or otherwise as to the extent of the admission or the qualification sought to be put upon it. And that is precisely the reason why, when some one who is not the company has to answer for the company, the admission must be guarded with proper restrictions. A corporate body cannot answer for itself, and it is necessary that some individual should answer for it. His function is to give the answer of the company. Some restriction must, therefore, be put upon the knowledge which he is to apply in answering the questions put to him. Where is the line to be drawn? It seems to me that it was drawn logically and practically by Brett L.J. in *Bolckow, Vaughan & Co.* v. *Fisher* (1), when he said that the person who is called upon to answer is not bound to answer as to what he has learnt accidentally, and not in the ordinary course of business. It is the function of the judge, with the assistance of counsel, when selecting the person who is to answer for the company, to see that he is a person who in the ordinary course of his business for the company will be able to give the proper information, which when given will bind the company just as if the company itself were able to take an oath, but with that limitation. His answer then is the answer of the company, and can be read against the company just as such an answer could be read against any individual. But it is said that information obtained by means of interrogatories might be exceedingly valuable. No doubt it might be, but it might be entirely outside the function of interrogatories, and outside the power of the Court to obtain information in that way. The party who

(1) 10 Q. B. D. 169.

wishes to obtain the information can if he chooses subpœna the person who can give it, and if his evidence is relevant it will be admitted at the trial. But, as my brother Rigby has pointed out, it is no part of the duty of the plaintiffs to assist the defendants in getting up evidence in support of their case. When once you grasp the fundamental principle, that the answer of the company's officer is the answer of the company and not of the individual, the whole thing follows logically. I think, therefore, that the decision of Byrne J. was erroneous, and must be overruled.

Solicitors: *Faithfull & Owen; M. Abrahams, Sons & Co.*

W. L. C.

DIDISHEIM *v.* LONDON AND WESTMINSTER BANK.

[1899 D. 442.]

Private International Law—Lunacy—Foreign Lunatic—English Property—Movables—Personal Estate—Curator—Administrateur Provisoire—Right to Sue in England—Order of Foreign Court—Jurisdiction—Detinue—Trover—Practice—Lunatic not so found, Action by—Next Friend—Maintenance—Scheme—Creditors—Priority—Lunacy Act, 1890 (53 & 54 *Vict.* c. 5), *ss.* 117, 134—*Form of Judgment—Stock—Vesting Order.*

An action brought in a proper case in the name of a lunatic not so found by his next friend, for the recovery of his property may, in the absence of any lunacy proceedings, be maintained without the sanction of the Court in Lunacy.

The Court in Lunacy, having property of a lunatic under its control, will, as between the lunatic and his creditors, see that proper provision is made out of the property for his maintenance, as the first and paramount consideration; but, subject to that, the Court will not withhold a creditor from exercising his legal rights (see note, post, p. 54).

A foreign curator or administrateur provisoire of a lunatic, not so found judicially, domiciled and resident abroad, is not necessarily an improper person to sue in this country as next friend for the recovery of the lunatic's personal property here, though, if such next friend is resident abroad, he may be required to give security for costs.

The Court in Lunacy has no jurisdiction under s. 134 of the Lunacy Act, 1890, to order the transfer of securities in this country standing in the name of or vested in a person of unsound mind, not so found, residing out of the jurisdiction of the High Court, unless his status has been altered

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by his being judicially declared lunatic according to the law of the place where he is residing.

G., domiciled and resident in Belgium, deposited with an English bank for safe custody, in his name, certificates and scrip for securities of great value. On his death in 1892 his widow, then also domiciled and resident in Belgium, took out administration in England to his estate, and had the securities then standing to his account, and also a sum of cash representing dividends thereon collected by the bank on his account, transferred to a new account opened by her at the bank in her own name.

In 1897 she became lunatic, though she was not so declared judicially, and was placed in a foreign lunatic asylum. D., a Belgian, was appointed by the Belgian Court her "administrateur provisoire," with power to collect and get in her personal estate, and subsequently D. obtained in England letters of administration de bonis non to G.'s estate, whereupon he brought an action in England against the bank in the names of himself and of Madame G. (the writ not stating that she was of unsound mind or that he was suing as her next friend) claiming, in his double capacity of legal personal representative of G. and of administrateur provisoire of Madame G., to have the certificates, scrip and cash standing in her name delivered up to him. North J., upon the action coming on before him for trial, took the preliminary objection that it was improperly constituted in that Madame G., being of unsound mind, could not sue without a next friend, whereupon D. was appointed next friend, and the title of the action was amended accordingly. The trial having then proceeded on that footing, North J. held that the defendants, the bank, could not safely deliver the property to the plaintiff D. without the authority of an order of the Court in Lunacy; and also that as the action was not one for the protection of the lunatic's person or property, but in the nature of detinue, it was not a form of action in which the lunatic could sue by her next friend. The plaintiff D. appealed, having first obtained from the Belgian Court an order giving him leave to appeal with a view to recovering the property:—

Held, by the Court of Appeal (Lindley M.R., and Rigby and Vaughan Williams L.JJ.), (1.) that as D. and Madame G. had together a clear legal title to the property sought to be recovered, D. was entitled, suing in his own name and as next friend of Madame G., to demand the delivery of her property to him and could give the bank a good discharge; and (2.) that, in the absence of lunacy proceedings in this country, the Court was bound, on general principles of private international law, to recognise the order of the Belgian Court giving D. leave to prosecute the appeal and to obtain and give a good discharge for the property.

Scott v. *Bentley*, (1855) 1 K. & J. 281, considered and approved.

In re Barlow's Will, (1887) 36 Ch. D. 287, discussed.

Form of judgment, including vesting order as to stock in Madame G.'s name.

ON October 16, 1866, Benedict Leopold Goldschmidt and Marie Woog, spinster, were married at Geneva. The husband was of German nationality, a merchant resident at Mainz.

The wife was of Swiss nationality. It had been agreed between the parties that they should marry under the legal system of community of goods prescribed by the civil code in force at Geneva; and to carry out that agreement a marriage contract dated October 15, 1866, the day before the marriage, was executed by the parties and duly registered at Geneva.

In the year 1867 M. Goldschmidt and his wife, he having given up business, took up their residence in Brussels, and resided there continuously till his death, both thus acquiring a Belgian domicil.

M. Goldschmidt made a will, valid according to Belgian law, dated April 23, 1891, by which, after reciting the marriage contract, he gave one-fourth part of his estate in ownership and one-fourth in usufruct to his wife, appointing her "legatee by universal title," without the obligation of investing the portion of which she would only have the usufruct. He died on June 10, 1892, leaving his widow and four children—two sons and two daughters. On July 2, 1892, his marriage contract was duly registered at Brussels.

Under the marriage contract and the law of Belgium the "community" became dissolved by the death of M. Goldschmidt, and thereupon the "community" property belonged, as to one-half to his widow, Madame Goldschmidt, beneficially and absolutely, and as to the other half to her deceased husband's estate; and under her husband's will and the law of Belgium Madame Goldschmidt became, upon his death, entitled beneficially and absolutely, subject only to the due administration of his estate, to one-fourth of his personal estate, and to the usufruct during her life of another fourth, the remaining two-fourths belonging to the four children in equal shares.

M. Goldschmidt had deposited for safe custody with the defendants, the London and Westminster Bank, where he had been in the habit of keeping a current account, certificates of stocks and shares registered or inscribed in his name, and scrip of bonds and shares payable to bearer, the certificates and scrip representing a very large sum of money in value.

On February 9, 1893, English letters of administration with her late husband's will annexed were granted to Madame

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Goldschmidt, who thus became his legal personal representative in England, whereupon a large balance of cash, representing income collected by the bank on M. Goldschmidt's securities, and placed to his account, was transferred by her, as administratrix, to a new account opened in her name in her private personal capacity, and her late husband's account was then closed. The scrip of the securities payable to bearer remained by her direction in the custody of the bank at her order and on her account. Of the inscribed securities, some were transferred into her own name, and the rest remained in that of her late husband, but the certificates for the whole continued by her direction in the custody of the bank on her account. Madame Goldschmidt subsequently sold some of the inscribed stocks and shares and applied the proceeds in payment of the shares of her three eldest children under her late husband's will. The share of the fourth child, Robert Goldschmidt, she did not pay, by reason of his infancy, he being at the date of his father's death in 1892 sixteen years of age.

In March, 1897, Madame Goldschmidt, who down to that time had continued to reside at Brussels, became of unsound mind, and in April, 1897, was placed in a private asylum at Bonn, in Germany, where she was now remaining. A family council, duly convened and held on December 20, 1897, gave the opinion that there was cause to appoint an "administrateur provisoire" for Madame Goldschmidt for the purpose of receiving and managing her property; and accordingly, by a judgment, made December 24, 1897, the Court of First Instance in Brussels, upon the application of the Procureur du Roi, after finding that Madame Goldschmidt was then under detention in a lunatic asylum, and that she had neither been placed under "interdiction" nor under guardianship, and that it was necessary that she should be provided with an administrateur provisoire, appointed the present plaintiff Charles Didisheim her administrateur provisoire. Shortly afterwards another family council was held, at which it was determined to exempt the administrateur provisoire from giving security for his administration, and no such security was ever in fact given or required.

By an order of the Probate Division made on August 5, 1898, letters of administration with the will annexed of the deceased, M. Goldschmidt, to his personal assets left unadministered by Madame Goldschmidt, were granted to the plaintiff, Charles Didisheim, the "provisional administrator" of Madame Goldschmidt, for her use and benefit so long as she should remain of unsound mind and so long only as he should remain provisional administrator; and the letters of administration granted to Madame Goldschmidt were directed to be impounded, which was done.

At this time the defendants, the bank, held on behalf of Madame Goldschmidt cash to a large amount, and also stock and share certificates and scrip of great value. The bulk of the cash and of the certificates and scrip formed part of her late husband's estate under the circumstances above stated, the remainder being her own private property. As she kept but one account at the bank, namely, her own private personal account, there appeared to be considerable difficulty in distinguishing which part of the cash and of the certificates and scrip belonged to her late husband's estate and which to herself.

Under the letters of administration granted to him by the Probate Division the plaintiff, Charles Didisheim, being desirous of paying Robert Goldschmidt, who had only recently attained twenty-one, his share of his father's estate, and of discharging his duties both as legal personal representative of M. Goldschmidt and as provisional administrator of Madame Goldschmidt, applied to the bank to hand over to him the cash and securities then in their custody or possession on her account, but the bank declined to recognise his title to give a proper discharge, or to recognise the title of any one other than Madame Goldschmidt herself. Thereupon Didisheim, on February 8, 1899, obtained an order from the Belgian Court authorizing him to represent Madame Goldschmidt in legal proceedings in England for the purpose of entering the action he proposed to bring against the bank. Then, on March 6, 1899, he issued the writ in this action, in the names of himself and of Madame Goldschmidt, against the bank (Robert Goldschmidt being joined as a defendant), claiming declarations to

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the effect that the plaintiff Didisheim, in his double capacity of legal personal representative of the late M. Goldschmidt and of administrateur provisoire of the person and property of the plaintiff Madame Goldschmidt, or partly in the one capacity and partly in the other, was entitled to call for the delivery and payment of, and to receive and give the defendant bank a good discharge for, the certificates, scrip and cash in their custody or possession, and for the income received or to be received by the defendant bank from the securities, and consequential relief. Among the certificates in the custody of the bank was a certificate for 500 shares in the bank itself, of which shares Madame Goldschmidt was the inscribed holder; and one of the claims in the writ was for a declaration that the plaintiff Didisheim, as her administrateur provisoire, was entitled to call for a transfer of these shares and payment of the dividends, or that the plaintiff Madame Goldschmidt was so entitled.

The action came on for trial before North J. on June 21, 1899. At the outset of the argument his Lordship called attention to the title of the action, pointing out that Madame Goldschmidt, being a person of unsound mind, could not sue without a next friend. He accordingly appointed the plaintiff Didisheim her next friend, subject to his consent to act being obtained, and the trial proceeded on that footing. Didisheim duly accepted the appointment, and the plaintiffs' title on the record when amended stood thus: "Charles Didisheim and Marie Goldschmidt (widow), a person of unsound mind not so found, by the said Charles Didisheim her next friend."

There was evidence that in Belgium there are two modes of proceeding for the legal protection of persons of unsound mind, namely, by "interdiction" or by "administration." The former is the more formal and public; if that mode of procedure is adopted the patient can be placed under interdiction and guardianship. In proceedings by "administration," the course adopted in the case of Madame Goldschmidt, and usually preferred, when possible, in order to avoid publicity, a provisional administrator may be appointed of the person and property of the patient; but under the Belgian statutes the appointment

ceases at the end of three years, or upon release from confinement of the patient within that period, though it may be extended by the Court. According to the law of Belgium the powers of the administrateur provisoire extend to all movable or personal property wherever situate, whether in or out of Belgium, and include the power, on behalf of the person for whom the administrateur has been appointed, to receive and give a good discharge for all personal property and moneys, whether capital or income, due at the commencement or to become due during the period of such administration, to indorse cheques, to demand and settle accounts, to sell investments and receive and give a good discharge for the proceeds, and to represent the lunatic in legal proceedings; but the power to sell investments and to represent the lunatic in legal proceedings may only be exercised under the authority of the President of the Court of First Instance.

The Courts of Belgium, in respect of questions depending on the status and capacity of a person, including the administration of his property, apply the law of the nationality of the person. According to the law of Germany, a German residing out of Germany for more than ten years loses his nationality. A person may lose his nationality and acquire no other nationality: in such case he is described as "sans patrie." Experts in Belgian law expressed their opinion that Madame Goldschmidt was "sans patrie" though domiciled in Belgium. Although the Code Napoleon, which is the basis of the law of Belgium, contains no express provision to that effect, the experts were of opinion that, if a person sans patrie were "domiciled" in Belgium, the Courts of Belgium would apply the law of Belgium to determine questions concerning the status and capacity of such person. "This," the experts deposed, "is the opinion of our greatest jurisconsults, and is the effect of a decision of the Court of Appeal of Belgium sitting at Liège." Thus, they said, in the case of an alien sans patrie domiciled in Belgium, though not naturalized, who becomes of unsound mind, imbecile or insane, it is within the competency of the proper Court to intervene by interdiction, or, where the patient is already in an asylum, by the appointment

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of an administrateur provisoire as fully as if the alien had been previously naturalized.

G. I. F. C.

Haldane, Q.C., and *H. Fellows*, for the plaintiffs. As to the property in the hands of the bank belonging to Madame Goldschmidt in her own right.

In the first place, as matter of fact, the domicil of Madame Goldschmidt is Belgian. In the second place, the law recognised by the Courts of this country as regulating her status and the status and rights of her curator or custodian of her personal property, in this case the administrateur provisoire, is the law of the country of her domicil. So that the right of the administrateur to sue in regard to personal estate, stands on the same footing as his right to sue in Belgium. On the evidence it is made out that, if this property were in Belgium, the administrateur would have had it handed over to him. Assuming that the title is perfect, this is a simple action in detinue substantially undefended. Westlake's Private International Law, 3rd ed. p. 49; *Newton* v. *Manning* (1); *Scott* v. *Bentley* (2); *Hessing* v. *Sutherland*. (3)

So in Scotland the title of an English curator to movable property of a lunatic is recognised: *Gordon* v. *Earl of Stair*. (4) Where there is a statutory jurisdiction under the Lunacy Regulation Act, or the Court is administering a fund in which a lunatic is interested, the Court has a discretionary power, and the right of a foreign curator is not always treated as absolute. Cases relating to circumstances of that kind do not apply, and nothing is to be found in any of them tending to limit the right of the administrateur to possess himself of the lunatic's property in this country. In some of those cases, the lunatic's whole property seems to have been handed over to the foreign curator or similar officer as matter of course; in others only a part. Instances of such cases are: *In re Barlow's Will* (5); *In re Brown* (6); *In re De Linden* (7); *In re Elias* (8); *Re*

(1) (1849) 1 Mac. & G. 362.
(2) 1 K. & J. 281.
(3) (1856) 25 L. J. (Ch.) 687.
(4) (1835) 13 S. 1073.
(5) 36 Ch. D. 287.
(6) [1895] 2 Ch. 666.
(7) [1897] 1 Ch. 453.
(8) (1851) 3 Mac. & G. 234.

Tarratt (1); *In re Mitchell* (2); *In re Garnier* (3); *In re Chatard's Settlement.* (4) If any of the property in the hands of the bank belongs to the estate of the testator, the plaintiff Didisheim has the legal title to it as administrator of the testator; so that, in one or other capacity, he is entitled to receive, and can give a good discharge for, the whole of the securities now in the hands of the bank.

Alfred Fellows, for the defendant Robert Goldschmidt.

H. Terrell, Q.C., and *MacSwinney,* for the defendant bank. The plaintiff Didisheim claims in three capacities. He claims suing as next friend of the lunatic in her name; an action of this kind for delivery up of property cannot be brought by a lunatic by a next friend; neither the lunatic nor the next friend, as such, can give a receipt; that form of action is proper where an injunction to preserve the property is required on administration of an estate in which the lunatic is interested is sought; but the Court itself will take care of the lunatic's property, and not entrust it to the next friend: *Beall* v. *Smith.* (5)

In the second place, the plaintiff Didisheim claims to have some of the property handed over to him as administrator of the testator. If there were any such property, not got in by the lunatic while sane, in the hands of the defendant bank, he might be entitled to have that handed over to him; but this property has been got in by the lunatic and appropriated; moreover, the property is so mixed that without an inquiry it could not be said which part, if any, is the property of the testator and which is that of the lunatic.

The more important claim is for delivery over of the property of Madame Goldschmidt to the plaintiff Didisheim as the officer of a foreign tribunal. His claim is founded on the allegation that the domicil of the patient is Belgian; that fact he has failed to establish, and on that ground alone the action fails. Again, he is suing, as he alleges, under the order of the Belgian Court; the effect of the order produced is by no means clear. But the main objection stands on a higher ground.

(1) (1884) 51 L. T. 310.
(2) (1881) 17 Ch. D. 515.
(3) (1872) L. R. 13 Eq. 532.
(4) [1899] 1 Ch. 712.
(5) (1873) L. R. 9 Ch. 85.

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The proper jurisdiction over the property in this country of a lunatic of whatever nationality, whether resident in or domiciled in this country or abroad, is that of the Queen acting by the duly constituted Lunacy Court, who will protect the property of a lunatic and apply it so far as is necessary and right for the benefit of the lunatic. The only person from whom the defendant bank—who are not trustees, and cannot, therefore, discharge themselves under the Trustee Relief Act—could safely take a discharge would be a receiver appointed by the Master in Lunacy. The only proper course for Didisheim to deal with the property is to take proceedings in Lunacy in this country: *Ex parte Southcote* (1); *In re Stark* (2); *In re Princess Bariatinski* (3); *In re Houstoun* (4); *Gordon* v. *Earl of Stair* (5); Dicey's Conflict of Laws, p. 507, r. 135.

In addition to the ancient jurisdiction of the Crown, the Lunacy Court has statutory jurisdiction (now under s. 134 of the Lunacy Act, 1890), without other lunacy proceedings in this country, on petition to hand over property of a lunatic to a curator duly appointed by a foreign Court. But even in that case the status of the lunatic must have been altered by a judicial decision of a foreign Court; and, secondly, there must have been an order of the foreign Court vesting within the meaning of the section the property of the lunatic in the curator; and, thirdly, the power is discretionary, and will not be exercised except so far as the property is actually wanted for the benefit of the lunatic: *In re Barlow's Will* (6); *In re Brown* (7); *In re Knight* (8); *In re Elias* (9); *Re Tarratt* (10); *In re Mitchell.* (11) There have been some cases, such as *In re Garnier* (12), where the Court of Chancery, in administering an estate in which a lunatic has an interest or money of a lunatic has been paid into court, has applied the whole of the lunatic's property for his benefit. These cases have nothing to do with the position of a mere debtor to or trustee for a lunatic.

(1) (1751) Amb. 109.
(2) (1850) 2 Mac. & G. 174.
(3) (1843) 1 Ph. 375.
(4) (1826) 1 Russ. 312.
(5) 13 S. 1073.
(6) 36 Ch. D. 287.
(7) [1895] 2 Ch. 666.
(8) [1898] 1 Ch. 257.
(9) 3 Mac. & G. 234.
(10) 51 L. T. 310.
(11) 17 Ch. D. 515.
(12) L. R. 13 Eq. 532.

Three cases were particularly relied on for the proposition that a foreign officer in the nature of a receiver in Lunacy is entitled to possess himself of the personal estate of the lunatic. *Scott* v. *Bentley* (1) was founded on a misapprehension of a decision in the House of Lords referred to as *In re Morison's Lunacy*, which will be found reported *nomine*, *Bayne* v. *Earl of Sutherland*. (2) *Newton* v. *Manning* (3) was an application in Lunacy, in which the Court exercised its statutory jurisdiction under the 34th section of the then Lunacy Act, while in *Hessing* v. *Sutherland* (4) an order was practically taken by consent.

Haldane, Q.C., in reply.

NORTH J. stated the facts, and, with regard to the order of February 8, 1899, by which the Belgian Court gave authority to the plaintiff Didisheim to represent Madame Goldschmidt in the present action, said he had great difficulty in construing it, there being a doubt as to whether it empowered Didisheim to claim the certificates, scrip and moneys belonging to Madame Goldschmidt, or was limited to empowering him to enter an action to obtain them. His Lordship then continued:—But I have no doubt that a further clearer order can be obtained, and I will assume for the present purposes that that authority, or one that could be obtained in the place of it, would give the plaintiff Didisheim a right to sue here.

Then he comes as provisional administrator thus armed to sue the bank. He takes proceedings against them to recover the property, some of which certainly belongs to Madame Goldschmidt, and some of which is said to belong to the estate of her husband; it is admitted it would be extremely difficult to say which was which. It cannot be decided now which is which, and it could not be said which was which unless some further inquiry took place. In other words, it would be necessary to administer this property in order to find out what part of the property belonged to each category. But this action is an action in the nature of a common law action for detinue,

(1) 1 K. & J. 281.
(2) (1750) 1 Cr. St. & P. 454.
(3) 1 Mac. & G. 362.
(4) 25 L. J. (Ch.) 687.

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and the provisional administrator asserts his right to sue in this country and to have the judgment of the Court that the bank shall deliver up to him all the property that the bank holds on behalf of Madame Goldschmidt in her own right, or as representing the estate of her deceased husband.

Now, I do not see my way to give judgment in his favour. There are many cases no doubt in this country where, when a man has been found lunatic abroad and a curator has been appointed by a foreign Court, the Court here has recognised his status and has handed over property of the lunatic to the curator. In some cases it has, in the exercise of a discretion which ss. 133 and 134 of the present Lunacy Act gives to the Court, and which the Court had under the earlier Acts—it has in some cases under that authority said that it will not part with the whole capital money, but will hand over a portion; sometimes the Court has refused to part with any of the capital money, but has given part or the whole, as the case might be, of the income of the property to the curator applying for it. A similar view has been adopted by the Court, not only in a case of lunacy, but where the Court has been administering trust funds part of which belonged to a lunatic, or such funds have been in the hands of a trustee. But the case of *In re Barlow's Will* (1), which lays down the law very clearly and simplifies what I, at any rate, have to do, points out that that has only been done in cases where there has been an ascertainment of the status of the lunatic by a foreign Court—that is to say, the person has been found lunatic, and, further, where the property has been vested in the curator or other official acting under the order of a foreign Court. *In re Barlow's Will* (1) and *In re Brown* (2) seem to me to lay down the law clearly for my purpose. [His Lordship read the head-note to *In re Barlow's Will* (1), and continued:—]

That seems to me to be a case very much in point, and, further, it points out not only what the position is of the Court acting as trustee, but in what position a trustee here would be who was applied to direct, by the Master in Lunacy in New South Wales, for payment over to him. It seems to me a

(1) 36 Ch. D. 287. (2) [1895] 2 Ch. 666.

statement by the Court of what the position of such trustee would be if that trustee was sued by the master direct for the money just as the bank is sued here. It is quite true in that case the claim was made against a trustee; in this case the bank is not a trustee, and cannot do what the trustee there did, namely, pay the money into court under the Trustee Relief Act. But whether there was a person sued at law or in equity, as distinguished from an application to the Court to deal with a fund in court—the right of a person applying to the Court and suing a trustee out of court was treated as being the same; and the reasons which the Court gave for refusing to do more than it did, as the judge pointed out, would also be reasons for a trustee who was applied to refusing to do more himself than the Court itself thought fit to do. That is to say, the judges, by way of illustration, dealt with the case where the money was not subject to the control of the Court. No doubt if the person applied to was a trustee, there would be a proceeding in the Chancery Division; if he was not a trustee, there might be a proceeding at common law. It seems to me that it was laid down that the rights of a master appointed in New South Wales against a person in this country holding property of a lunatic were the same whether he held the money as trustee, or whether he held it in a capacity such that he could be sued in detinue. [His Lordship read from the judgment of Cotton L.J. (1), from the judgment of Bowen L.J. down to the passage "we cannot accede to the view that he" (the Master in Lunacy in the Colony) "is here presenting a petition for something which he is entitled to claim as of right," and from the judgment of Fry L.J. down to the passage, "I think his position would have been materially different if there had been a declaration of lunacy by the competent Colonial Court, and he had been invested with the estate of the lunatic as a consequence of that declaration," and continued:—]

It was not so there, and nothing was done except to confirm Kay J.'s view in the exercise of a discretion as to what payments should be made for the benefit of the lunatic.

In *In re Brown* (2) a lady had been found lunatic in the

(1) 36 Ch. D. 292, 293. (2) [1895] 2 Ch. 666.

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Colony of Victoria, the lunatic had been declared lunatic by the Supreme Court of the Colony sitting in Lunacy, and the Master in Lunacy in the Colony was manager of her property, which consisted of English stocks standing in her name. [His Lordship read the judgment of the Court delivered by Lindley L.J. from the bottom of page 671 to the end, and continued:—]

In that case there were the two things—the judicial finding of lunacy altering the status of the lunatic, and the vesting of the property in the Master in Lunacy of the Colony. Those appear to me to be the two leading cases on the subject; others were referred to indicating the same view. I will only refer to one: *In re Knight.* (1) [His Lordship read the head-note, and continued:—]

So that the Court refused to recognise the absolute right of the committee or curator or other foreign official, but recognised that it had a discretion under the statute which it could exercise under proper circumstances. The Court was considering whether there could be dealing in England with respect to the property of a lunatic who was not here. [His Lordship read from Lindley M.R.'s judgment (2) down to the sentence, "The real truth is that the jurisdiction of the Court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in s. 134." His Lordship read s. 134 of the Lunacy Act, 1890, and continued:—]

So that the enactment applies only where the patient has been found formally to be a lunatic. In the present case there has been no finding of any sort that this lady is a lunatic. There are in Belgium, it appears, two modes of administering the estate of a person of unsound mind, one by interdiction, the other without resorting to that jurisdiction, and the family, for reasons which one can quite understand, have declined to resort to that jurisdiction. That being so, they must take the consequence, and, in my opinion, it is impossible to say that the officer appointed by the Belgian Court, under the circumstances stated, has power to sue here to recover from a debtor

(1) [1898] 1 Ch. 257. (2) [1898] 1 Ch. 261.

to the patient, or from a trustee for the patient, or from the Court; if the Court holds funds belonging to the estate it is impossible for him to come here and sue in respect of that title. If he could, his doing so would have the effect of depriving this Court of the jurisdiction, which the last passage I read shews it has, over the property in this country of a person who is what is called a foreign lunatic. In my opinion, therefore, it is impossible to say that I can do what I am asked to do.

I should say that there were three cases relied on particularly by Mr. Haldane in support of his view: *Newton* v. *Manning* (1), *Scott* v. *Bentley* (2), and *Hessing* v. *Sutherland*. (3)

Now, *Newton* v. *Manning* (1) does not seem to me to go far enough to support the plaintiffs' case. *Scott* v. *Bentley* (2) no doubt does, but it proceeded upon, and was based upon, a decision of the House of Lords which on investigation turns out to have been totally different from what was supposed in that case. The Scottish Court had refused to allow an English curator to sue there, and the House of Lords reversed their decision, not because the curator had a right to sue, but upon the ground that the lunatic, who was joined, had a right of action. It seems to me, therefore, that *Scott* v. *Bentley* (2) is no authority in the present case.

Then *Hessing* v. *Sutherland* (3), the other case relied upon, is a peculiar case. The defendant there was, as the defendant here is, not claiming anything beneficially, but claiming to be made safe. And no doubt in that case a judgment was made—not by his consent, because he refused to consent, but without opposition by him—under which a trustee in this country, who had become the trustee of a certain investment made in the name of that trustee and the curator, the curator was allowed to recover the money here against his co-trustee. But in each of these cases the lunacy had been found by a competent tribunal. That, in my opinion, takes the present case entirely outside the principle of those decisions.

There are subordinate difficulties in the plaintiffs' way which

(1) 1 Mac. & G. 362. (2) 1 K. & J. 281.
(3) 25 L. J. (Ch.) 687.

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I do not dwell on in detail. As regards the construction of the order made in February, 1899, I have assumed that a more complete order can be obtained if necessary.

Then there was the question as to domicil. The plaintiffs' case here depends entirely upon the proof of domicil in Belgium. The question arises out of the fact of this lady being domiciled in Belgium, and therefore subject to Belgian law; and of the existence of the general rule, "Mobilia sequuntur personam"; and therefore would have to be dealt with according to Belgian law. I am not satisfied that there is sufficient proof that she is domiciled in Belgium. When she and her husband married twenty-five years ago, they were neither of them Belgians, they had nothing to do with Belgium. They seem to have gone to Belgium soon afterwards, and to have lived there ever since. That in itself is not sufficient to prove domicil; and as the whole basis of the plaintiffs' case is rested upon the footing that the domicil is Belgian, I think that further evidence ought to have been produced to shew it, and I cannot assume now that all the evidence that can be produced has been produced. What might be the case if it were clear that nothing further could be produced need not be considered, because I am satisfied that further evidence can be produced. But I do not dwell on this, because, although I think it is a defect in the plaintiffs' way at present, yet if, on the rest of the case, I decided the matter in favour of the plaintiffs, subject only to the question of domicil, I should give the plaintiffs the opportunity of giving further evidence to shew that the domicil, the foundation of their right to sue, was such as is alleged. I do not think it necessary to do that, because there is a larger question behind, and I feel it is impossible for me, looking at the authorities, to say that this is a case in which the plaintiff is entitled to succeed; neither can the co-plaintiff, the lunatic, suing by a next friend, obtain judgment in such an action as this. I call her lunatic for convenience: it is a word which describes her condition. I do not see how a person of unsound mind can sue in this form of action by her next friend. If it were necessary to protect the person of the lady of unsound mind, or to protect her property, no doubt she might sue by

her next friend. But here there is not a case of protecting the person or the property. The person is perfectly safe, and the property is perfectly safe. There is no doubt about that. The object is not to keep the property safe, but to take it away from where it is and hand it over to this curator. I do not see how an action of that sort can be brought by a lunatic and her next friend. It is quite impossible that the money should be handed over to the lunatic, and it is equally impossible that it should be handed over to the next friend.

Then, further, the provisional administrator claims as the husband's administrator. I do not see how any relief in this action could be given on that footing. It is clear that the lady did direct the transfer from her name as administratrix into her own name in her private personal capacity of a considerable portion of the husband's property. That has been got in by her, received by her, and then put into her own name. I do not see how the legal personal representative here of property not administered can claim to recover that now. It is quite true that, inasmuch as one of her sons has not been paid, he might possibly take proceedings for the purpose of having what is due to him raised out of that property and follow the property; but his right in that respect would be a totally different right from that of administrator de bonis non to recover from the person who has administered it what is no longer held by the bank as agent for or debtor to the husband, or the husband's legal personal representative, but has been paid to the widow in her own right.

Under these circumstances, I think that my course is clear in regard to the points I have decided, and therefore I must dismiss the action.

D. P.

In consequence of the difficulty felt by North J. in his judgment as to the meaning and extent of the above-mentioned order of the Belgian Court of February 8, 1899, the plaintiff Didisheim, on November 25, 1899, obtained from the Belgian Court an order authorizing him to submit to the Court of Appeal and, if necessary, to the House of Lords in England,

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the judgment of North J., and also to enter any other legal proceedings which he might think proper before the English Courts with a view to recovering, in his capacity of provisional administrator of the person and property of Madame Goldschmidt, the whole of the certificates of registered investments, the securities to bearer, the sums in cash, and all other securities deposited with the bank, or due from the bank, "without exception or reservation." Acting under the authority of that order the plaintiff Didisheim appealed from the judgment of North J. In order to meet the objection raised by his Lordship in his judgment, further evidence was subsequently obtained as to Madame Goldschmidt's domicil. This evidence, which was read on the appeal, appeared to establish beyond doubt that she had acquired a Belgian domicil.

C. A. The appeal was heard on March 15, 16, and 19, 1900.

Haldane, *Q.C.*, and *H. Fellows*, for the plaintiff Didisheim. The further evidence obtained since the decision of North J. clearly establishes that Madame Goldschmidt's domicil is Belgian. Moreover, the further order obtained since that decision from the Belgian Court confers on the plaintiff as administrateur provisoire a complete title to the possession of the movable property of the lunatic. This action is in substance an action of detinue, and in such an action the Court will, in accordance with international law, give effect to the title asserted here of the foreign curator of a lunatic domiciled abroad.

It is said in opposition to this that the jurisdiction of the English Court of Lunacy extends to all lunatics whether they are foreigners or not, and that the property of a lunatic can be recovered only by means of an exercise of the discretionary power of that Court. But it is submitted that, if under the law of the domicil the movable property of the lunatic has become vested by assignment in a curator appointed by the Court of the domicil, the English Court will hand that property over to him. *In re Barlow's Will* (1), upon which North J. mainly relied, was a decision upon a petition under the Trustee Relief Act. The Court there came to the conclusion that the

(1) 36 Ch. D. 287.

statute of the Colony of New South Wales did not provide for the vesting in the master of the property of a lunatic not so found judicially, and that the master could not therefore claim as of right to have the lunatic's property handed over to him; and the Court accordingly exercised its discretion by declining to order the money which was in court to be paid to him. In *In re Brown* (1) a lunatic resident in the Colony of Victoria had been so found judicially, and the Court of Lunacy here directed property of the lunatic in this country to be transferred to the Master in Lunacy in the Colony, being satisfied that the property was required for the maintenance and support of the lunatic. If the title of the foreign curator to movables is clear under the law of the domicil, it is submitted that it ought to be recognised by an English Court where the English Lunacy jurisdiction has not been invoked; and there is no suggestion that any one intends to invoke that jurisdiction in the present case. The right to the possession of the movable property of the lunatic has been conferred on the plaintiff by a competent Court, and that (without proof of ownership) is sufficient to entitle him to recover the property in an action of detinue.

In *Newton* v. *Manning* (2) Lord Cottenham L.C. said he had no jurisdiction to deal with the property of a person found lunatic by a foreign jurisdiction except in conformity with the laws of the foreign country. That proposition applies here. In *Scott* v. *Bentley* (3) a curator bonis had been appointed in Scotland to a lunatic there, and Wood V.-C. held that the curator could recover and give a good discharge for personal property of the lunatic in England. There had not been an inquisition in that case, it not being the practice in Scotland to have an inquisition. The Vice-Chancellor referred to a Scottish case, *In re Morison's Lunacy*, which he said seemed not to have been reported. It seems doubtful whether that case was, as Wood V.-C. thought, an express authority that the English committee of a lunatic could recover personal estate of the lunatic in Scotland. The title of the case appears to have been *Morison* v. *Earl of Sutherland* (4) or *Bayne* v.

(1) [1895] 2 Ch. 666.
(2) 1 Mac. & G. 362.
(3) 1 K. & J. 281.
(4) (1749) Mor. Dict. 4595.

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Earl of Sutherland. (1) In *Hessing* v. *Sutherland* (2) it was held that the Court had jurisdiction to order the transfer of English Government stock, which was held in trust for a lunatic (so declared by a Scottish Court), to his curator bonis appointed in Scotland. So in *Gordon* v. *Earl of Stair* (3) the Scottish Court acted on the broad principle that the title of a committee appointed in England to the movable property in Scotland of a person of unsound mind ought to be recognised in Scotland. As to the power of a foreign curator of a lunatic to sue in this country, see Dicey's Conflict of Laws, pp. 507 et seq.; Westlake's Private International Law, 3rd ed. p. 49.

[LINDLEY M.R. referred to *Alivon* v. *Furnival.* (4)]

All the above cases are in favour of the title of the plaintiffs to sue.

There is another class of cases which seems to have caused some confusion. In *In re Stark* (5) the Court was exercising its discretionary jurisdiction in lunacy, and it refused to order Consols standing in the name of a lunatic to be transferred to her curator bonis in Scotland, but directed the dividends to be paid to him. In *In re Elias* (6) Lord Truro L.C., acting in the same jurisdiction, ordered, "after some hesitation," bank stock to be transferred to the curator of a lunatic appointed according to the law of Holland; and said that he should have had no difficulty in making the order if it had been shewn that the lunatic was a Dutch subject. In *Re Tarratt* (7) the question was whether there was sufficient evidence within the meaning of s. 141 of the Lunacy Regulation Act, 1853, that the lunatic had been so declared by the Scottish Court; and the Lunacy Court, being satisfied that the evidence was sufficient, ordered some debenture stock which stood in the name of the lunatic to be transferred to his Scottish curator bonis. *In re Clyde* (8) was a similar case, and there the Court declined to order the transfer to the guardian (appointed in Ireland) of the person and estate of a lunatic of New Zealand

(1) (1750) 1 Cr. St. & P. 454.
(2) 25 L. J. (Ch.) 687.
(3) 13 S. 1073.
(4) (1834) 1 C. M. & R. 277; 40 R. R. 561.
(5) 2 Mac. & G. 174.
(6) 3 Mac. & G. 234.
(7) 51 L. T. 310.
(8) W. N. (1889) 43.

stock standing in his name in the books of the Bank of England, on the ground that it had not been shewn that the personal estate of the lunatic had been vested in the guardian within the terms of s. 141 of the Lunacy Regulation Act, 1853. Now, s. 134 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), has taken the place of s. 141 of the Act of 1853, which is repealed by the Act of 1890. And s. 141 did not affect the right of a properly appointed foreign curator of a foreign lunatic to recover movable property of the lunatic in this country, if the property was "vested" in the curator. The word "vested" in s. 134 includes the right to obtain and deal with the lunatic's personal estate, without becoming the actual legal owner of it: *In re Brown*. (1) *In re Garnier* (2) was a case under the Trustee Relief Act. An Englishman while travelling in France was found a lunatic by a French Court, and it was held that the French committee of his estate, or curator bonis, could recover as of right a fund to which the lunatic was entitled, and which had been paid into court under the Trustee Relief Act. The Court having a discretion, and being satisfied that the lunatic was sufficiently provided for, retained the fund in court, and ordered only the payment of the income to the curator. It does not appear that in that case there had been any assignment of the lunatic's property to the curator. Similar observations apply to *In re Barlow's Will*. (3) And in *In re Brown* (1), in which the lunatic had been so declared, the Court exercised its discretion in lunacy by ordering stock belonging to the lunatic to be transferred to the Colonial Master in Lunacy as the guardian of the lunatic. In *In re De Linden* (4) a fund to which a lunatic was entitled was in court under the Trustee Relief Act. The lunatic was a Bavarian subject resident in Bavaria, and she had been adjudged of unsound mind by the Royal Bavarian Court. Under these circumstances Stirling J. ordered the fund to be paid out to the persons who by the Bavarian law were entitled to receive the lunatic's property. *In re Knight* (5) was a case in Lunacy, and turned upon the

(1) [1895] 2 Ch. 666.
(2) L. R. 13 Eq. 532.
(3) 36 Ch. D. 287.
(4) [1897] 1 Ch. 453.
(5) [1898] 1 Ch. 257.

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discretion of the Court. It has no application to the present case.

In the present case the Court is not asked to part with any money which is under its control, or to exercise any discretion, whether conferred by statute or otherwise. This is an action of detinue, and the plaintiff relies on his legal title according to the law of the lunatic's domicil. By the comity of nations, the Court will always give effect to the law of the domicil, when so to do will not lead to any result contrary to natural justice.

No instance has been found of an inquisition of lunacy being held in this country in the case of a person who is domiciled and resident abroad, and who has only movable property in this country. In *In re Houstoun* (1) a lunatic so found in Jamaica, where his property was situated, came to England, and it was held that a commission ought to issue against him here. In *In re Southcote* (2) a commission of lunacy was ordered against an Englishman who was resident in France and had real estate in England. In *In re Princess Bariatinski* (3) a commission was issued against an alien, but she was resident in England and had property in the English funds. Here we have both nationality and residence out of the jurisdiction; and the movable property, which is within the jurisdiction, is regulated by the domicil. To refuse the plaintiffs relief would lead to a deadlock, for the money and stocks in the hands of the bank would remain there, and the defendant Robert Goldschmidt would be left indefinitely without his share. A legal chose in action may be recovered here by the owner, whether he be an alien or a British subject. It is said that the plaintiff Madame Goldschmidt, being incompetent to sue, cannot give a legal discharge, and that Didisheim cannot recover because he is not legal owner of the chose in action. We submit that Didisheim is the assignee of the chose in action, and as such the legal owner; and we have also the equitable owner, Madame Goldschmidt, here; both together are clearly entitled to recover according to the well-settled old practice. That

(1) 1 Russ. 312. (2) 1 Amb. 109; 2 Ves. Sen. 401.
(3) 1 Ph. 375.

Didisheim is an assignee of the chose in action is decided by *Alivon* v. *Furnival* (1) and other cases already referred to. As to the contention that the proper course for dealing with this property is by means of lunacy proceedings in this country, there is no authority for the proposition that the Court in Lunacy will, in the case of an alien, grant an inquisition in lunacy and alter his status merely because he may have movables here. In *In re Princess Soltykoff* (2) the Court felt a difficulty about making a lunatic alien a lunatic by inquisition here without the concurrence of the foreign committee, even though the lunatic alien had real estate here. Then it is said that, if it is not the proper course to proceed in lunacy here, the parties should proceed by interdiction in Belgium and have a tuteur appointed who might then come here for relief; but in that case, if the tuteur sued here, he would be met by the difficulty that was raised in *Thiery* v. *Chalmers, Guthrie & Co.* (3) The question is one of mere technicality. Since we have both the legal and equitable title, this Court can recognise the authority of the foreign Court and of the plaintiffs' title now; if not, a tuteur will be appointed, whose title will be recognised by the Court. There is no reason why the Court should decline to recognise the authority of the Belgian Court in the one case, and recognise it in the other.

Alfred Fellows, for the defendant Robert Goldschmidt.

H. Terrell, Q.C., and *MacSwinney*, for the defendant bank. All that the bank requires is to have a sufficient discharge by handing over these certificates, &c., to persons who are the proper hands to receive them. Our first objection to the plaintiffs' claim is that the only Court that can make an order dealing with the property in this country of a lunatic is the Court in Lunacy.

[LINDLEY M.R. But an action relating to the property of a lunatic may be brought in the name of a lunatic.]

We are not aware of any such case.

[VAUGHAN WILLIAMS L.J. I have been in such cases myself, both for plaintiff and defendant.]

(1) 1 C. M. & R. 277, 296; 40 R. R. 561.

(2) W. N. (1898) 77.

(3) [1900] 1 Ch. 80.

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In any such action the defendant might move to dismiss it on the ground that there was no retainer, and that the plaintiff was incompetent to give a retainer.

[LINDLEY M.R. referred to *Re Metcalfe's Trusts.* (1)]

There must be a discretion in the Court to stop a person bringing an action in the name of a lunatic. On principle, inasmuch as a lunatic is incapable of authorizing or instructing a solicitor, if a solicitor takes upon himself to bring an action in the name of a lunatic, the defendant must be able to have the proceedings stayed; otherwise, supposing judgment is given against him and he pays the solicitor, he may find himself liable to be sued a second time: *Reynolds* v. *Howell.* (2)

[LINDLEY M.R. As to the costs of staying an action improperly brought in the name of a plaintiff, this Court now follows *Reynolds* v. *Howell.* (2)]

As in *Fricker* v. *Van Grutten.* (3)

[RIGBY L.J. referred to *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (4) as to commencing an action in the name of a plaintiff without authority.

LINDLEY M.R. In *Porter* v. *Porter* (5) the Court held that a person of unsound mind could bring a partition action by his next friend. A doubt as to the practice had previously been raised in *Wartnaby* v. *Wartnaby.* (6)]

We submit that if it appears on the face of the record that the plaintiff is a lunatic, though suing by a next friend, the Courts have no jurisdiction: *In re Barlow's Will.* (7) A foreign lunatic not so found cannot stand in a better condition than an English lunatic of unsound mind not so found; and though in some exceptional cases a lunatic not so found has been allowed to sue, there is no reported case in which an action of this kind has been brought by an English lunatic. The rule is that the next friend of a lunatic not so found can only sue for the purpose of protecting the lunatic's property, and then only so far as may be necessary for that purpose, and a next friend who

(1) (1864) 2 D. J. & S. 122.
(2) (1873) L. R. 8 Q. B. 398.
(3) [1896] 2 Ch. 649.
(4) (1879) 13 Ch. D. 310.
(5) (1888) 37 Ch. D. 420.
(6) (1821) Jac. 377.
(7) 36 Ch. D. 287.

brings an action on behalf of a lunatic not so found does so at the risk of the proceedings being subsequently repudiated: *Beall* v. *Smith*. (1) In *Halfhide* v. *Robinson* (2) James L.J. said a bill could not be filed by a next friend on behalf of a person of unsound mind not so found for dealing with his real estate.

[LINDLEY M.R. That observation has been commented on as going too far in *Porter* v. *Porter* (3), where Cotton L.J. said he thought that what James L.J. meant was that the course taken in the case was not the proper course, but that there should have been a petition to the Lords Justices under the Lunacy Regulation Acts.]

The observation by Jessel M.R. in *Jones* v. *Lloyd* (4), to the effect that a suit could be instituted by a lunatic not so found by his next friend, was intended to refer only to a suit for the protection of property, and not to a suit for payment of money. Here the lunacy jurisdiction could have been invoked, and therefore it was not right to put the defendants to the embarrassment of proceedings under a different jurisdiction. The proper course is not to allow this action to proceed until an inquiry has been directed as to the alleged lunacy of the plaintiff Madame Goldschmidt, and whether the action is for her benefit: *Lee* v. *Ryder* (5); *Howell* v. *Lewis* (6); *Waterhouse* v. *Worsnop*. (7) At any rate the defendants cannot be asked to accept the receipt of this lady or her next friend, for neither of them can give a proper discharge.

The real question is whether Didisheim, by virtue of his position as administrateur provisoire, is entitled to sue in this country. We submit he is not. The moment a person becomes lunatic or of unsound mind in this country the Crown is constituted guardian of his property in order that out of it provision may be made for him and his family; and any one desiring to deal with that property must apply to the Crown as represented by the Court in Lunacy: see the old statute De

(1) L. R. 9 Ch. 85, 91.
(2) (1874) L. R. 9 Ch. 373.
(3) 37 Ch. D. 420, 428, 429, 430.
(4) (1874) L. R. 18 Eq. 265, 274.
(5) (1822) 6 Madd. 294.
(6) (1891) 61 L. J. (Ch.) 89; 40 W. R. 88.
(7) (1888) 59 L. T. 140.

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Prerogativâ Regis, 17 Edw. 2, st. 2, s. 9, A.D. 1324, held in *Beverley's Case* (1) to extend to the lunatic's "goods and chattels" as well as "lands and tenements"; also the forms of the old writs in lunacy (2 Fitzh. Nat. Brev. 9th ed. pp. 232–3). Accordingly, upon a lunacy the right of the Crown, or of the Court in Lunacy, immediately ousts the jurisdiction of the ordinary courts over the lunatic. The jurisdiction of the Court in Lunacy, as representing the Crown, to direct an inquisition and to appoint a committee applies even to a person domiciled or resident abroad where he has property in this country: *In re Knight.* (2)

[LINDLEY M.R. That was a case under s. 134 of the Lunacy Act, 1890.]

The provisions of that Act are not limited to persons resident within the jurisdiction; and it is clear from the authorities that domicil of the lunatic within this country is not necessary in order to found the jurisdiction of the Court in Lunacy under the statute De Prerogativâ Regis—in short, that domicil is not material to the question of jurisdiction: *In re Sottomaior* (3); *In re Princess Bariatinski* (4); *In re Houstoun* (5); *In re Garnier.* (6)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Marchioness of Annandale.* (7)]

The only material question is, Where is the property? The statute De Prerogativâ Regis does not deal with the lunatic's person at all—only with his property. The lunacy jurisdiction is founded upon "property": it is the fact of the lunatic having property in this country that alone gives the Court jurisdiction, and this jurisdiction is equally applicable whether the lunatic is an Englishman resident abroad or a foreigner resident here. That this is so is clear from the provisions, which would otherwise be useless, in ss. 96, 131, sub-ss. 2, 3, ss. 134, 149, of the Lunacy Act, 1890. A foreign decree or commission appointing a curator or committee of a lunatic

(1) (1603) 4 Rep. 123 b, 126 a.
(2) [1898] 1 Ch. 257.
(3) (1874) L. R. 9 Ch. 677, 681.
(4) 1 Ph. 375.
(5) 1 Russ. 312.
(6) L. R. 13 Eq. 532.
(7) (1749) Amb. 80.

resident abroad does not necessarily entitle that curator or committee to obtain an order from the Courts of this country empowering him to deal with the lunatic's property in this country: Dicey's Conflict of Laws, pp. 10, 507. There is no case to be found in the books in which any such right of a foreign curator or committee has been exercised. There being then a jurisdiction in lunacy, there is no authority supporting the plaintiffs' contention that they are entitled to bring this action. As to *Newton* v. *Manning* (1), the basis of that decision was that there had been an actual finding in lunacy by the foreign Court: it was held that if you come here armed with an "order" appointing a curator, in accordance with the authority of the foreign jurisdiction, to deal with the lunatic's property here in the manner desired, the Court in Lunacy will exercise its statutory jurisdiction by ordering a transfer of the property to that curator. So in *In re Brown* (2)—where *In re Barlow's Will* (3) is distinguished on that ground—and *In re De Linden*. (4) As to *Scott* v. *Bentley* (5), Wood V.-C. there proceeded entirely upon an erroneous view of the decision of the House of Lords in *Morison's Case* (6), which, according to the reports, really was that the foreign committee could not sue in this country for the property of the foreign lunatic. We are therefore relieved from the pressure of *Scott* v. *Bentley*. (5) If that decision is right, it altogether ousts the jurisdiction of the Court in Lunacy.

[LINDLEY M.R. mentioned *In re Sir F. Seager Hunt*. (7)]

We submit that, even assuming the order made by the Belgian Court is equivalent to a finding in lunacy, the ordinary English Courts have no jurisdiction to make such an order as is now asked for.

But, secondly, we contend that the order appointing Didisheim administrateur provisoire is not, as is shewn by the expert evidence, an order vesting in him the property of the lunatic so as to empower him to sue in this country. Such

(1) 1 Mac. & G. 362.
(2) [1895] 2 Ch. 666.
(3) 36 Ch. D. 287.
(4) [1897] 1 Ch. 453.
(5) 1 K. & J. 281.
(6) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(7) Post, p. 54.

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an order is not equivalent to an "interdiction" or finding in lunacy. There is no finding here that Madame Goldschmidt is a lunatic, and consequently there is no vesting of property; both these circumstances are necessary to give Didisheim a title to sue. Moreover, the effect of the recent order of November 25, 1899, is merely to authorize Didisheim to take legal proceedings in his capacity of administrateur provisoire, and that is not sufficient for the present purpose. In *In re Barlow's Will* (1) it was held that a Master in Lunacy has not the powers of a committee; the property of the lunatic is not vested in him as it is in the committee. So here, Didisheim's position is something short of that of a committee.

Therefore, even if we are wrong on our first point, we say that Didisheim is not competent to sue in this country in the name of this lady. The incapacity, according to English law, of the curator of a foreign lunatic to receive dividends on, or to transfer, English stocks or funds standing in the name of the lunatic has been the express foundation of the enactments contained in the successive lunacy statutes: 1 & 2 Geo. 4, c. 15, 6 Geo. 4, c. 74, s. 14, and the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

[LINDLEY M.R. referred to *Sylva* v. *Da Costa* (2), and 1 Collinson on Lunatics, p. 290.]

Here it is proposed to hand over personal estate of very large value to a foreigner and a person who has given no security whatever. To allow this would be to establish a dangerous practice, and one entirely opposed to the uniform practice of the Court of Chancery, acting in its administrative capacity, when dealing with the property of persons of unsound mind. For instance, in cases under the Trustee Relief Acts, the Court administers trust funds for the benefit of cestuis que trust, where they are not competent, by directing the application of the income only; it never orders payment over of the capital: see the cases collected in Seton on Judgments, 5th ed. pp. 1012–1014. If a foreign lunatic has property in this country, it must be either this country or the foreign country

(1) 36 Ch. D. 287. (2) (1803) 8 Ves. 316.

that has jurisdiction; both cannot, and we submit that it is this country that has the jurisdiction in such a case.

Haldane, Q.C., in reply, cited Pope on Lunacy, 2nd ed. pp. 324, 326, 327, and *Lacey* v. *Burchnall* (1), as shewing that a lunatic not so found can sue by his next friend, though as a check on reckless and improper proceedings the Court may direct an inquiry as to the propriety of the suit, or of the conduct thereof, or of the fitness of the next friend; that such an inquiry should be applied for by motion; and that an objection taken at the hearing to the propriety of the proceedings is too late.

Cur. adv. vult.

1900. April 2. The judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.) was delivered by

LINDLEY M.R. In consequence of the arguments addressed to us, we will make a few prefatory observations on actions at law and suits in Chancery by persons of unsound mind not so found by inquisition.

If before the Judicature Acts an action at law had been brought in the name of such a person to enforce a purely legal demand—say an action on a covenant or an action of assumpsit or of debt, detinue or trover—there would have been no defence to the action on the ground that the plaintiff on the record was of unsound mind. No plea in bar or in abatement applicable to such a case is to be found in the books. Such an action might, perhaps, have been stayed on an application shewing that the action was an abuse of the process of the Court—i.e., was brought in the plaintiff's name without his authority: see *Waterhouse* v. *Worsnop* (2), which, however, was since the Judicature Act. Such an action could certainly have been stayed by proceedings in lunacy and the appointment of a committee. Unless the action were stayed it would proceed to trial in the ordinary way, and on proof of the plaintiff's case judgment would have been entered for the plaintiff on the record and execution issued accordingly: see *Dennis* v. *Dennis*. (3) If the plaintiff had sued by attorney, payment or

(1) (1863) 3 N. R. 293.
(2) 59 L. T. 140.
(3) (1670) 2 Wm. Saund. 334.

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delivery to him would have discharged the defendant or the sheriff. If the plaintiff had sued in person, a difficulty would obviously have arisen. An application to stay execution on payment into court might, we suppose, have been successfully made; or the Court could, as in *Gleddon* v. *Trebble* (1), have ordered payment to his next friend, and so the necessity of instituting proceedings in lunacy might be avoided: see generally 1 Collinson on Lunacy, 339, &c.

In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition, by a next friend. Applications to stay such suits were also frequently made with success: see generally on such suits *Jones* v. *Lloyd* (2); *Beall* v. *Smith* (3); *Farnham* v. *Milward & Co.* (4); *In re George Armstrong & Sons.* (5) The alleged lunatic could make such application himself if he asserted his sanity; and any one willing to act as next friend could make it in the alleged lunatic's name, as in *Howell* v. *Lewis.* (6) Even the defendant might apply: see *Wartnaby* v. *Wartnaby* (7) and *Porter* v. *Porter* (8), per Cotton L.J. When a lunatic was so found by inquisition, the Court of Chancery would stay a suit instituted in his name until the appointment of a committee: see *Hartley* v. *Gilbert.* (9)

We are not aware of any case in which a foreign curator has been held to be an improper next friend of the person whose curator he is. Security for costs from such a next friend might be required if he were resident abroad; but no suit could be stayed simply because the next friend filled an official position in a foreign country.

The notion that either at law or in equity an action or suit cannot be successfully maintained, if brought in the name of a lunatic not so found by inquisition, without the sanction of the Crown, is not supported by authority or sound principle. If this notion were true, the orders for payment made in *In re Barlow's Will* (10) and other cases, which will be referred to

(1) (1860) 9 C. B. (N.S.) 367.
(2) L. R. 18 Eq. 265.
(3) L. R. 9 Ch. 85.
(4) [1895] 2 Ch. 730.
(5) [1896] 1 Ch. 536.
(6) 61 L. J. (Ch.) 89.
(7) Jac. 377.
(8) 37 Ch. D. 429.
(9) (1843) 13 Sim. 596.
(10) 36 Ch. D. 287.

presently, would have been clearly wrong. Such orders were not made in lunacy, but by the Court of Chancery, which had no lunacy jurisdiction. It is well settled that until the Crown interferes, or at all events until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical legal effect. In other words, no person can avail himself of that prerogative without taking the proper steps to induce the Crown to exercise it. This point was examined by this Court last summer, when *Seager Hunt's Case* (1) was before it. In the present case no lunacy proceedings have been taken in this country; nor was any attempt made to stay the action.

Having made these preliminary remarks, we pass to the question more immediately before the Court. This action is by M. Didisheim and by Madame Goldschmidt; by him as her next friend. The object is to obtain a large sum of cash and also share and stock certificates and scrip for bearer bonds and shares of great value from the defendants. The defendants are quite ready to pay and deliver these up provided they can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Madame Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Madame Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Madame Goldschmidt's

(1) Post, p. 54.

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property; but they say that, owing to what she did when sane, all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash, certificates and scrip which are the property of Madame Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. North J. has held that, unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Madame Goldschmidt to M. Didisheim, they cannot safely deliver such property to him.

The relations and friends of Madame Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The title of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Madame Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The Court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether, in an action brought by M. Didisheim in his own name and in the name of Madame Goldschmidt and as her next friend, the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is.

In *Scott* v. *Bentley* (1) a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic, and a curator bonis was appointed according to Scottish law. Whether he was judicially declared a lunatic does not distinctly appear; nor does it appear that the owner-

(1) 1 K. & J. 281.

ship of his personal property was by Scottish law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear, the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Wood V.-C. made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend, we see no ground for doubting the correctness of the decision.

Scott v. *Bentley* (1) has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland, in *In re Morison's Lunacy.* (2) This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone* v. *Beattie* (3) and in *Sill* v. *Worswick.* (4) In *Johnstone* v. *Beattie* (5) Lord Brougham refers to *Morison's Case* (2) as cited in the note to *Sill* v. *Worswick* (4), and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This, it is plain, was also Wood V.-C.'s view of *Morison's Case* (2), as is apparent from his remark (6) that in *Morison's Case* (2) the curator sued alone. But the reports of that case to which we have referred (2) shew that the decision of the House of Lords in *Morison's Case* (2) did not go that length, and Lord Campbell was not satisfied that it did. (7) We understand the decision as

(1) 1 K. & J. 281.
(2) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(3) (1843) 10 Cl. & F. 42.
(4) (1791) 1 H. Bl. 677-8; 2 R. R. 816.
(5) 10 Cl. & F. 97.
(6) 1 K. & J. 285.
(7) 10 Cl. & F. 133.

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shewing that a committee appointed in England of a Scotsman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morison's Case* (1), therefore, did not go so far as Wood V.-C. thought, but it goes a long way to shew that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Madame Goldschmidt and curator of Madame Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott* v. *Bentley* (2) Wood V.-C. did not by any means base his judgment only on the supposed decision in *In re Morison's Lunacy* (1); and after making every allowance for his misapprehension in that case, *Scott* v. *Bentley* (2) was, in our opinion, well decided, although we cannot help thinking that, if Wood V.-C. had known the form of the order made in *Morison's Case* (1), he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend.

In *Alivon* v. *Furnival* (3) Parke B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind.

Scott v. *Bentley* (2) is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *Re Tarratt* (4), *In re De Linden* (5), and *Thiery* v. *Chalmers, Guthrie & Co.* (6) are the most recent and important. In *In re De Linden* (5) an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian Court to take charge of her and her property. The order was made as asked —that is, for payment, not to her, but to the two persons

(1) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(2) 1 K. & J. 281.
(3) 1 C. M. & R. 277, 286; 40 R. R. 561.
(4) 51 L. T. 310.
(5) [1897] 1 Ch. 453.
(6) [1900] 1 Ch. 80.

appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators.

Thiery v. *Chalmers, Guthrie & Co.* (1) was a similar case. The lunatic there was a French subject declared lunatic in France, and whose property was placed under the care of a duly appointed tuteur. An action was brought in this country by the lunatic by a next friend and by the tuteur as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the tuteur. Kekewich J. thought that the tuteur might have sued alone in his own name. He regarded the decision in *In re Brown* (2) as an authority for so holding, inasmuch as both in *In re Brown* (2) and in *Thiery* v. *Chalmers, Guthrie & Co.* (1) the lunatic had been formally so declared by the foreign Court. But *In re Brown* (2) was not an action; it was an application to the Court in Lunacy under s. 134 of the Lunacy Act, and we doubt whether the action in *Thiery* v. *Chalmers, Guthrie & Co.* (1) would have been rightly framed if brought by the tuteur as sole plaintiff.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by s. 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic, cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight* (3) turned on the discretion which the Court had under s. 134 of the Lunacy Act, and throws no real light on this case.

The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow's Will.* (4) In that case a Colonial statute vested in a Master in Lunacy the care and custody of the property of lunatic patients—that is, of persons confined in lunatic asylums but not judicially declared lunatic. A Colonial lady, confined in a lunatic asylum in the Colony, was entitled to some funds in the hands of trustees in this country, and the

(1) [1900] 1 Ch. 80.
(2) [1895] 2 Ch. 666.
(3) [1898] 1 Ch. 257.
(4) 36 Ch. D. 287.

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Colonial Master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The Colonial master and the lady by her next friend presented a petition for the transfer of the funds in court to the Colonial Master in Lunacy. The Court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the Court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the Colonial Act to the master as an officer of the Colonial Court was not supplemented by any order giving the master any express authority, as the lunatic's attorney, to get in any property not locally within the jurisdiction of the Court; and, as we understand Cotton L.J.'s judgment, he was much influenced by the omission of any such order. If the master's authority derived from the Colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case, the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the Court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them; and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier* (1), where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the Court as unsatisfactory. But where it is not, the considerations which weighed with the Court in *In re Barlow's Will* (2) do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the Court acting for them have no discretion to

(1) L. R. 13 Eq. 532. (2) 36 Ch. D. 287.

refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the Court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the Court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark* (1), other considerations at once arise. If, as in *In re Garnier* (2), the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the Courts of this country were bound to recognise the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the Courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the Court here has to do is to see that the person claiming it is entitled to have it.

In this case the order of the Belgian Court of November 25, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on him by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on that subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—that is, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognise it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could

(1) 2 Mac. & G. 174. (2) L. R. 13 Eq. 532.

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have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognise: see per Blackburn J. in *Hollins* v. *Fowler* (1) and the cases there cited. But in practice, if in such a case the plaintiff proved his title to the satisfaction of the Court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and, in a proper case like this, giving the defendants the costs of the action—that is, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title: see *Gleddon* v. *Trebble*. (2) If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering delivery to the plaintiffs and ordering them to pay the costs. However tried, any other result would be very unjust.

Mr. Terrell suggested that the order of the Court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this Court now declares it ought to have made; and this Court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian Court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.

The judgment of the Court of Appeal was in the following form:—

"Upon motion by way of appeal from the judgment of the 4th July, 1899, &c. This Court doth order that the said judgment be reversed: and doth

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(1) (1875) L. R. 7 H. L. 766. (2) 9 C. B. (N.S.) 367.

declare that the plaintiff Charles Didisheim in his double capacity of the legal personal representative in England of the late Benedict Leopold Goldschmidt deceased, and of administrateur provisoire duly constituted according to the law of Belgium of the person and property of the plaintiff Marie Goldschmidt, or partly in one and partly in the other of such capacities, is entitled to call for the delivery or payment of and to receive and give the defendant bank a good discharge for (*a*) The certificates for the several stocks and shares and the scrip for the several bearer bonds and shares enumerated in the first, second and third parts of the schedule hereunder written or such of them as are within the custody of the defendant bank: (*b*) The amount now standing or hereafter to stand to the credit of the plaintiff Marie Goldschmidt upon her current or any other account with the defendant bank: and (*c*) All other property (if any) of the said B. L. Goldschmidt and M. Goldschmidt, or either of them, now in the custody of the defendant bank. And it is ordered that the defendants, the London and Westminster Bank, Limited, do deliver up such certificates, scrip and other property (if any), and do also pay the amount now standing or hereafter to stand to the credit of the current or any other account of the plaintiff M. Goldschmidt at the said bank, to the plaintiff C. Didisheim. And this Court doth also declare that the plaintiff C. Didisheim, while he is such administrateur provisoire as aforesaid, is entitled to call for the payment of and to receive and give the defendant bank a good discharge for the dividends, as they from time to time become due, upon the 500 shares of the defendant bank mentioned in the second part of the said schedule, and also to transfer the said 500 shares or any of them. And it is ordered that the defendants the London and Westminster Bank, Limited, do pay the said dividends to the said C. Didisheim while he is such administrateur provisoire as aforesaid and the said shares remain registered in the name of the said M. Goldschmidt, and to permit the transfer of the said shares by the said C. Didisheim while he is such administrateur provisoire as aforesaid. And it is ordered that the plaintiffs C. Didisheim and M. Goldschmidt, or one of them, do pay to the defendants, the London and Westminster Bank, Limited, their costs of this action and of and occasioned by the said appeal, and all other costs incurred at the request of the said C. Didisheim, such costs, the plaintiffs by their counsel consenting, to be taxed by the taxing master as between solicitor and client, unless the same shall be agreed within 21 days after delivery thereof by the defendant bank to the plaintiffs."

The schedule above referred to.

Part I.

Investments registered in the name of B. L. Goldschmidt deceased.

Part II.

Investments registered in the name of M. Goldschmidt.

Part III.

Bearer investments.

Solicitors: *Stibbard, Gibson & Co.; Travers-Smith, Braithwaite & Robinson.*

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NOTE.

C. A. 1899, July 3.

In re SIR F. SEAGER HUNT.

ON April 29, 1898, upon evidence that Sir F. Seager Hunt, Bart., was through mental infirmity arising from disease incapable of managing his affairs, though he had not been found lunatic by inquisition, Smith L.J., sitting in Lunacy, made an order appointing his wife, Lady Hunt, interim receiver of his estate for fourteen days, pending the appointment of a committee, or quasi-committee. On May 11, 1898, the Master in Lunacy made an order under s. 116 of the Lunacy Act, 1890, appointing Lady Hunt to exercise the powers of a committee over her husband's estate until further order. On May 3, 1898, that is, between the dates of the two orders, one Attenborough—who had, prior to the order of Smith L.J., obtained judgment in the Queen's Bench Division against Sir F. Seager Hunt for 10,000*l.* and interest on a promissory note—obtained an order from Darling J. charging the judgment debt upon Sir F. Seager Hunt's interest in a certain partnership firm.

Before Attenborough obtained the charging order, he was informed that his judgment debtor was of unsound mind, and that proceedings for the appointment of a committee were pending. The business of Sir F. Seager Hunt's partnership firm was subsequently sold to a limited company, and 70,000 ordinary shares were allotted as the consideration for his interest. These shares were registered in the name of the Paymaster General. They were said to be at present of doubtful value, no dividends having yet been paid upon them.

On April 18, 1899, a scheme for Sir F. Seager Hunt's maintenance was, under s. 117 of the Lunacy Act, 1890, settled by the Master in Lunacy, who directed that the 70,000 shares should be excepted from the scheme, since he found that there were sufficient funds for providing maintenance without resorting to the shares.

The question now was whether, under a summons taken out for the purpose in the lunacy, Attenborough, the judgment creditor, was entitled to enforce his charging order on the shares by foreclosure or sale, notwithstanding that it had been obtained subsequently to the exercise of the jurisdiction of the Court in Lunacy by the order of April 29, 1898.

Swinfen Eady, Q.C., *W. M. Cann*, and *C. L. Attenborough*, for Attenborough, while admitting that under the jurisdiction in Lunacy sufficient maintenance for the lunatic out of his property was in all cases the first consideration, contended that, subject to that prior claim, the Court in Lunacy would not interfere with judgments and orders of the ordinary Courts of law.

Upjohn, Q.C., and *T. L. Wilkinson*, for Lady Hunt, and also for her husband's unsecured creditors, contended that the charging order was irregular and that the proceedings under it should have been stayed by the judge in Lunacy, it having been obtained by Attenborough with the knowledge that his debtor was of unsound mind, and that lunacy proceedings were pending; and moreover that the order had been obtained without the appointment of a guardian ad litem as required by the rules of the Court for the protection of the interests of a person of unsound mind not so found.

LINDLEY M.R. It is quite obvious that Mr. Attenborough's charging order, which was obtained on May 3, 1898, and which has been before the

Court frequently since that date and has never been questioned by anybody, cannot now be treated as invalid simply upon the ground that the judge in Lunacy might have objected to the taking of any proceedings upon it, or could have required Mr. Attenborough to treat it as having been invalidly obtained. It has been treated as valid, with full knowledge of all the facts, by the persons whose duty it is to look after the interests and protect the interests of the lunatic, and which duty, so far as I know, has been efficiently performed. It would be grossly unjust now to Mr. Attenborough to say that that charging order ought to be treated as invalid, because it might have been stopped some fifteen months ago. There is nothing unjust in point of law. If the judge in Lunacy had considered it for the benefit of the lunatic so to do, he might have stayed all further proceedings on it. There is nothing in Mr. Upjohn's argument as to irregularity. The judge in Lunacy, in dealing with the creditors of the lunatic, always considers what is for the benefit of the lunatic first, so far as the property under the control of the judge is concerned. That is part of the law of the land, and is of so long standing that no judge in Lunacy, nor this Court, could alter it. It is our duty, as the law stands, to look to the interest of the lunatic; but when we have done that, and when we have provided for the lunatic to the extent the judge in Lunacy thinks right, there is nothing which justifies the Court in withholding a creditor from exercising his legal rights and getting paid if he can. Here the master has made a scheme for the maintenance of the lunatic, and it is found that there are 70,000 shares in this company which are not required for his maintenance. We are told they are worthless: we are told that whatever value they may have is a prospective value, and that they do not at present yield dividends, and that they are worth nothing; but at any rate they are outside what is wanted for the proper and adequate maintenance of the lunatic. Mr. Attenborough has a charging order on those shares, and he asks to be at liberty to enforce his security. In point of form, as I understand, these 70,000 shares are registered in the name of the paymaster, who of course is an officer of the Court.

The proper order will be that Lady Hunt, who has been appointed to act with the powers of a committee, shall sell those shares with the approbation of the master and apply the proceeds in payment of Mr. Attenborough. The master will have control over the sale. If Mr. Attenborough desires liberty to bid, he can have it.

As to the costs, Mr. Attenborough's costs must be added to his security. We do not think it is right to make Lady Hunt pay them or make the lunatic's estate bear them; and her costs should be retained by her out of the lunatic's estate with the approbation of the master. It is not a case for making her pay the costs.

As to the other creditors, they have nothing whatever to do with this matter. The irregularity of the order, even if there were any irregularity, is nothing to them. Of course, I see that any secured creditor who carries off his security prejudices unsecured creditors: that is all; but in any legal sense they have no locus standi at all.

SIR F. H. JEUNE and ROMER L.J. concurred.

Solicitors: *Stanley Attenborough*; *Wellington Taylor*.

G. I. F. C.

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March 20, 22;
April 9.

ALEXANDER *v.* AUTOMATIC TELEPHONE COMPANY.

[1898 A. 1411.]

Company—Shareholder—Subscriber of Memorandum of Association—Liability to Pay for Shares—Issue of Shares on Different Terms—Directors—Breach of Duty—Power to make Calls—Duty to make Calls on their own Shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 11, 14, 15, 22, 23, 31, 38.

A subscriber of the memorandum of association of a company limited by shares is (in the absence of any provision in the articles of association, or of an express agreement between him and the company, to the contrary) not liable to make any payment in respect of the shares for which he subscribes, except as and when calls are made upon him in accordance with the provisions of the articles.

If directors issue other shares besides those which are taken by the subscribers of the memorandum, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient.

But if directors require other applicants for shares to make payments on application and allotment, and issue their own shares for which they have subscribed the memorandum without requiring any such payments to be made, and without disclosing to the other shareholders this difference between their position and that of the directors, they commit a breach of duty, even though in so doing they act without fraud, and in the belief that they are doing nothing wrong.

Directors who so use their powers as to obtain benefits for themselves at the expense of the other shareholders, without informing them of the facts, cannot be allowed to retain those benefits, but must account for them to the company, so that all the shareholders may participate in them.

Decision of Cozens-Hardy J., [1899] 2 Ch. 302, reversed.

Appeal against the decision of Cozens-Hardy J. (1)

The Automatic Telephone Company, Limited, was incorporated by registration on July 1, 1897, with a capital of 100,000*l.* in shares of 5*s.* each. The eight signatories to its memorandum of association were Margowski, for 19,400 shares; the same person, as managing director of the Honduras Government Banking and Trading Company, Limited, for 6000 shares; M. J. Alexander, for 10 shares; J. D. Gibbs, for 10 shares; Baron Cohen, for 10 shares; Justin Mendelson,

(1) [1899] 2 Ch. 302.

for 10 shares; J. W. Cohen, for 200 shares; and H. G. Sworn, for 800 shares. Clause 5 of the articles of association provided that the shares of the company should be "under the control of the directors, who may, subject to the terms of the company's memorandum of association, issue, allot, or otherwise dispose of the same to such persons, for such consideration, and upon such terms and conditions as the board may determine . . . . and may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls." Clause 13 provided that the directors might "(subject to any special terms made on allotment) from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit; provided that one month's notice at least is given of the time and place for payment, and that no one call shall exceed 20 per cent. of the nominal amount of the shares, and that such calls shall be made at intervals of not less than one month." It was alleged by the defendants that on June 30, 1897 (before the company was incorporated), it was agreed at a meeting of the signatories of the memorandum of association that nothing should be payable by Margowski, J. W. Cohen, Sworn, or the Honduras Company on application or allotment in respect of their memorandum shares, and that the memorandum was signed by them on this condition. At a board meeting after the incorporation of the company, namely, on July 5, 1897, at which all the directors of the company, namely, Margowski, J. W. Cohen, Sworn, Alexander, and Gibbs were present, two resolutions were passed (Alexander and Gibbs being present and voting in their favour).

The first resolution was "that applications for 9560 shares of 5*s*. each be accepted, and that 9560 shares of 5*s*., numbered 26,441 to 36,000 inclusive, be and are hereby allotted to the applicants in the respective quantities applied for by each, as per application and allotment sheets marked B, C, D, E, F, now signed by the chairman, and that letters of allotment as now approved be this day posted to such allottees, and that there shall be payable on allotment the sum of 2*s*. 6*d*. on each of such shares of 5*s*. so allotted."

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ALEXANDER v. AUTOMATIC TELEPHONE COMPANY.

The sum of 6*d.* per share had already been paid in respect of these shares by the applicants, as provided by a printed form of application which was furnished to them.

The second resolution was "that applications from the signatories to the memorandum and articles of association of the company for 26,440 shares of 5*s.* each be accepted, and that 26,440 shares of 5*s.* each numbered from 1 to 26,440 inclusive be and are hereby allotted to them in the respective quantities applied for by each, as per application and allotment sheet marked A, now signed by the chairman."

The sum of 2*s.* 6*d.* per share was paid in respect of the 9560 shares upon allotment. The plaintiffs paid up their shares in full. The other three directors and the Honduras Company did not make any payment on the allotment of their shares.

The action was brought by Alexander and Gibbs, "suing on behalf of themselves and all other the shareholders" in the defendant company (except the defendants), against the company and the three directors, Margowski, J. W. Cohen, and Sworn. The plaintiffs alleged that in respect of the shares held by Margowski, J. W. Cohen, Sworn, and the Honduras Company, only 784*l.* in all had been paid, and that on these shares there was still due and payable the sum of 3176*l.*, and the plaintiffs complained that the three defendant directors, being a majority of the board, were able to and did control its action by their votes, and that they, in breach of their duty as directors and against the interests of the defendant company, prevented the passing of resolutions or taking steps to enforce payment by those defendants or the Honduras Company (in which they were said to be interested) of the amounts due on their shares and the shares held by the Honduras Company. This, however, the plaintiffs complained, did not prevent the defendant directors by means of their voting power making a further call of 1*s.* per share, and the plaintiffs' case was that the defendant directors were acting in furtherance of their own interests and in fraud of the rights of the other shareholders, and were using the powers entrusted to them as directors for their own ends and not for the benefit of the company. It was also alleged that the defendant directors

had control of the majority of the votes of the shareholders of the defendant company. The plaintiffs claimed a declaration that the holders of the memorandum shares were bound to pay up 3*s.* per share—namely, 6*d.* on application and 2*s.* 6*d.* on allotment—in the same way as the holders of other shares.

The defendants pleaded the alleged agreement made before the incorporation of the company, and the resolutions passed by the directors immediately after the incorporation, and alleged that they had not been guilty of any dereliction of duty.

Cozens-Hardy J. dismissed the action, holding that the defendants were not bound to make any payment in respect of their shares until calls were made upon them in manner provided by the articles of association.

The plaintiffs appealed.

Rawlinson, Q.C., and *Harry Dobb*, for the plaintiffs. First, as soon as a company is formed the contract between the company and the signatories to the memorandum is complete—on the one side to deliver the shares, and on the other side to take them. It is said that art. 5 applies here; but under that article special terms and conditions may be attached to any particular allotment of shares. No such terms and conditions have been attached to the shares allotted to the directors themselves under the resolution of July 5, 1897, and therefore those shares at once became liable to any calls which might afterwards be made. Neither under art. 5 nor under art. 13 is it necessary that there should be a call as a condition precedent to suing the shareholder; art. 13 is merely an enabling clause, and would be no answer to an action against the shareholder: *Fothergill's Case.* (1)

Secondly, directors are in the position of trustees for the general body of shareholders as regards the power of making calls, and may not use that power for their own benefit at the expense of the shareholders at large. Here, the act of the directors, in making a general call without first levelling up their shares which had not yet been paid for, was not done

(1) (1873) L. R. 8 Ch. 270.

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for the benefit of the company or of the general body of shareholders, but was done for the benefit solely of the three directors who had not paid, and who had voted in the majority for the resolutions of July 5, 1897. It is submitted that this constituted a fraudulent act, and that consequently they must be treated as having made calls upon their own shares as well as upon the shares of the other shareholders, and as liable to pay accordingly, so as to put all the shares on the same level: *Gilbert's Case.* (1)

Rufus Isaacs, Q.C., and the *Hon. Frank Russell*, for the company and Margowski.

[LINDLEY M.R. I do not see why the three directors were not guilty of a breach of duty to the company and the shareholders generally by treating themselves differently from the other shareholders.]

It was essential that these three gentlemen should join the board, and it is clear that before the registration of the company Margowski at any rate in agreeing to subscribe for shares refused to take them upon any other terms than those which were embodied in the resolutions of the board meeting of July 5, 1897. Margowski's position therefore is, that he took his shares under an express agreement upon a certain footing and no other. Why, then, should he now be called upon to level up his shares?

In the absence of any agreement the subscribers of the memorandum of association were not bound to pay the amounts which other applicants for shares were required to pay on application and allotment.

[LINDLEY M.R. But the directors stand in a fiduciary relation to the shareholders. Can they as between themselves and the other shareholders place themselves in a better position as to the payment for their shares, suppressing the fact that they are to be placed in a more favourable position? Can directors thus obtain for themselves a pecuniary advantage without full disclosure to the other shareholders?]

The subscribers of the memorandum are liable to pay the full amount of their shares, just as the other shareholders,

(1) (1870) L. R. 5 Ch. 559, 565–6.

but they are not bound to pay till calls are made upon them. They cannot be compelled to pay anything before a call is made, unless the agreement on the faith of which they signed the memorandum is set aside and a new agreement made. The articles (clause 5) empower the directors to make a difference between different shareholders as to the time of payment of calls, and this provision is in accordance with s. 24 of the Companies Act, 1862. No doubt *Gilbert's Case* (1) shews that directors are trustees of their power of making calls for the general body of shareholders. But here the directors were acting bonâ fide, and the resolutions of July 5, 1897, shewed what they were doing. The plaintiffs themselves knew what was being done, and they were parties to it. They are estopped from complaining of it, and other shareholders cannot obtain relief through them.

Astbury, *Q.C.*, and *W. F. Hamilton*, *Q.C.*, for the defendant Sworn. The only question raised in the Court below was, whether there was on July 5, 1897, a debt of 3*s.* per share due from the defendant directors, and the plaintiffs are not entitled to raise any other question now. The honesty of the defendants cannot now be impeached; all charges of fraud were withdrawn in the Court below. The plaintiffs were parties to the doing of that of which they now complain, and they are estopped from objecting to it.

But is a subscriber of a memorandum of association liable to make a payment on the allotment of shares to him, no call having been made upon him? Until a call is made there is no debt due from him in respect of the shares. The defendants by virtue of their signature of the memorandum of association became liable to pay up the amount of their shares as and when calls should be made upon them. The other applicants for shares made a voluntary application for shares upon specified terms as to payments to be made on application and allotment.

[LINDLEY M.R. Is it consistent with the duty of directors to the shareholders to require the other shareholders to make a payment of 3*s.* per share at a time when they themselves pay

(1) L. R. 5 Ch. 559.

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nothing, and they do not make this difference known to the other shareholders?]

It is submitted that there is nothing to prevent directors from accepting applications for shares on specified terms, while leaving their own liability as it is imposed by law.

A director who signs the memorandum of association does not become a director until after he has signed it, and cannot commit a breach of trust at the time when he signs it. No decided case has gone so far as to shew that the defendants in what they have done have committed a breach of trust. Primâ facie there was nothing wrong in issuing shares on different terms as to payment.

If there was a breach of the directors' duty to the company, the company ought to be the plaintiffs in the action. It could not be a breach of duty to the company to accept the money paid by applicants for shares; it was their duty to accept it.

How was there any breach of duty towards the shareholders? The directors were named in the articles, and the shareholders must be taken to have known that they as signatories of the memorandum were liable to pay for their shares only when calls should be made upon them.

[VAUGHAN WILLIAMS L.J. If the directors had called up 1*s.* per share on all the shares they would have obtained a larger sum for the benefit of the company than they did by the course which they actually adopted.]

They could have raised money on the security of the uncalled capital.

The onus is on the plaintiffs to shew that the directors committed a breach of duty by refraining from imposing on themselves a liability which the law did not impose. They could not have been sued for these moneys as a debt, and this is what the plaintiffs are now attempting to do.

The defendant J. W. Cohen, in person.

Rawlinson, Q.C., in reply. The plaintiffs gave up in the Court below the charges of fraud, but they did not abandon their claim on the ground of breach of duty. The point was argued, though the judgment of the Court did not deal with it.

The directors could not properly use their power of making calls in their own favour. *Gilbert's Case* (1) exactly applies. They must be taken to have done their duty and to have made a call on themselves.

The action is really one by the company against their directors who have done wrong; but for the fact that the directors control the majority of votes the company would have been the plaintiffs. To an action by the company a personal objection to the present plaintiffs would be no answer.

Cur. adv. vult.

April 9. LINDLEY M.R. Subscribers to the memorandum of association of a company limited by shares are liable, but only liable, by virtue of their subscription to pay up the amount of their shares as and when called up. The times when payments are to be made and the amounts to be paid are not prescribed by statute, except by s. 38 of the Companies Act, 1862, which only comes into operation when the company is being wound up. But until the commencement of the winding-up of the company the times and amounts of payment depend, apart from express agreement between the company and the signatories, on the company's articles of association. In the absence of other articles, Table A will be applicable. That this is the true position of those who sign the memorandum of association is perfectly plain from the Companies Act, 1862, ss. 8, 11, 14, 15, 23, and 38, and Table A, arts. 4–7. A subscriber of a memorandum becomes by s. 23 a member in respect of the number of shares subscribed for by him, without any further application by him or allotment of shares to him. But, as by s. 22 all shares have to be numbered, and the numbers must be entered in the register (see s. 25), there must be an appropriation to each subscriber of the proper number of shares properly numbered, not to constitute him a member, but to enable a proper register to be kept, and proper certificates to be given and transfers made. See ss. 22, 25, and 31, and Table A, clauses 2, 3, and 8–16. It follows from this that, in the

(1) L. R. 5 Ch. 559.

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absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made upon them. This is the strength of the defendants' case.

Further, if more shares than those taken by the subscribers of the memorandum are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing pro tanto the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs. This is the weakness of the plaintiffs' case. From this point of view the plaintiffs have no ground of complaint, and the decision appealed from is unimpeachable.

But there is another point of view from which the case must be regarded. There are other elements in the case which have to be taken into consideration, and on these the plaintiffs strongly rely. The directors, who had subscribed the memorandum for an unusually large number of shares, issued shares to other persons on the terms that 6*d.* per share should be paid on application and 2*s.* 6*d.* per share on allotment—i.e., 3*s.* per share had to be paid by the allottees, whilst the directors themselves paid nothing in respect of their own shares. The directors, in fact, so managed matters as to place themselves in a better position as regards payment than the other shareholders, and they did so without informing the other shareholders of the fact. This, the plaintiffs contend, was a breach of duty on the part of the directors to those who applied for and took shares upon the faith that the directors were not obtaining advantages at their expense. It is no answer to the plaintiffs' case so put to appeal to the contracts alone, for the charge is that the directors were guilty of a breach of duty in

procuring those contracts and in taking advantage of them so as to benefit themselves at the expense of the other shareholders. In the statement of claim and in the Court below the defendants were charged with deliberate fraud; but this charge was ultimately abandoned in the Court below, and, having been abandoned, it cannot be brought forward again, or be listened to on the appeal.

But, apart from all fraud, and although the directors acted in the belief that they were doing nothing wrong, there may, nevertheless, have been a breach of duty such as is relied upon, and it is necessary to consider whether there was or was not such a breach of duty.

The company was registered on July 1, 1897. On June 30 the memorandum of association was signed, and the subscribers had a meeting at which, it is said, they agreed that the defendants should pay nothing in respect of their shares on allotment. Such an agreement, if come to, could not, of course, bind the company, which was not then formed. But the defendants say that the plaintiffs Alexander and Gibbs were then told that the defendants were not to pay up anything on their shares on allotment, and that the plaintiffs assented to this arrangement. The plaintiffs emphatically deny that they knew of or assented to any such arrangement. On July 5 the first meeting of the directors was held, and on that day two resolutions were passed. One was that the shares subscribed for by those who signed the memorandum of association should be allotted to them. The resolution treats them as applying for 26,440 shares of 5*s*. each, and as having those shares allotted to them in the quantities applied for by each, "as per application and allotment sheet marked A, now signed by the chairman." This shewed that three of those subscribers for ten shares each—namely, Alexander, Gibbs, and Baron Cohen—had paid up or were to pay up 3*s*. per share in respect of their 5*s*. shares. There was nothing to shew that the other subscribers had paid or were to pay anything on their shares. There was a conflict of evidence at the trial as to whether the defendants did or did not explain to their co-directors that they did not intend to pay up 3*s*. on their shares. The plaintiffs Alexander and Gibbs

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distinctly deny that they were told anything of the sort. They deny that they saw the sheet A. The defendant Cohen and the secretary say that it was explained that the others did not intend to pay, and that the sheet A was produced. The learned judge finds that Alexander and Gibbs knew of the resolution and concurred in it, but he does not say that these gentlemen are not to be believed when they deny that they were informed that the other directors were not going to pay. So far as it is necessary for the defendants to rely on any agreement exempting them from liability to pay 3*s.* like other shareholders, I am of opinion that they fail in proving such an agreement. The resolution of July 5 to which I am referring did not by itself, and apart from the conduct of the defendants as directors, either increase or diminish the defendants' liability as subscribers of the memorandum of association. It simply carried out what their subscription involved. The other resolution passed at the same meeting was to allot 9560 shares to persons who had applied for them on payment of 2*s.* 6*d.* per share. This was in addition to 6*d.* per share already paid on application. Other shares have been issued on similar terms. Both the plaintiffs Alexander and Gibbs are holders of shares besides those for which they subscribed the memorandum of association; and they paid up 3*s.* per share for all of them on allotment. So far, therefore, they are in the same position as all the other shareholders except the defendants. The fact, however, that three subscribers of the memorandum paid 3*s.* on their shares whilst the defendants did not, is difficult to reconcile with the existence of any understanding that all the subscribers should stand on their strict legal rights. The defendants rely on clause 5 of the articles as entitling the directors to issue shares on any terms they think expedient, and to make differences between some shareholders and others. But this, I am satisfied, is an afterthought. The defendants were not in fact acting on this article at all. But, even if they were, this article would not, in my opinion, justify them in making a difference in their own favour without disclosing the fact to the other shareholders and obtaining their consent to the arrangement. The Court of Chancery has always exacted

from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim "Caveat emptor" has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them. *Gilbert's Case* (1) is only one of many instances illustrating this principle.

In the present case there is no question but that, by obtaining 3*s*. a share from the other shareholders and paying nothing themselves, the defendants threw upon the other shareholders a burden which they did not share themselves. It is true that by clause 121 of the articles dividends were only payable in proportion to the amounts paid up on the shares; and as regards dividends, had there been any, the defendants would have been at a disadvantage. But the advantage they obtained at the expense of the other shareholders was that of deferring their own contributions to the funds of the company at the expense of the other shareholders. This, in my opinion, was a clear breach of duty, unless the other shareholders knew of it and sanctioned it.

The defendants say that the memorandum and articles, which named the first directors, gave notice to all the shareholders that nothing was payable by the defendants except when calls were made on their shares. The defendants further say that, at all events, the plaintiffs Alexander and Gibbs knew and assented to what was done, and that this action, therefore, cannot be sustained by them. As regards the notice given by the memorandum and the articles to the shareholders generally, I am clearly of opinion that they give no notice of anything except what they expressly state; they give no notice at all that the directors would so exercise their powers, and so act towards their shareholders, as to benefit themselves at their expense. It is impossible to come to the conclusion that the

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applicants for shares knew of or sanctioned the conduct of which they now complain.

The next question is, whether the plaintiffs Alexander and Gibbs knew of and assented to any arrangement to the effect that the defendants should be in a better position than themselves and other shareholders as regards payment on allotment. As already stated, the plaintiffs emphatically deny that they knew anything of the sort, and they say that they first discovered in July or August, 1898, that the defendants had not paid up 3*s.* on allotment like other shareholders. They say that they were unable to see the books and ascertain the facts before that time. They say, and Rhodes, a solicitor who was present at the signing of and attested the signatures to the memorandum, confirms them, that nothing was said when the memorandum of association was signed on June 30, 1897, about not paying like other shareholders; and the plaintiffs say that nothing was said about it when the allotment was made on July 5, 1897. Against this must be set the resolutions then passed, and the testimony of Mr. Cohen and Mendelson, the secretary of the company. I have already referred to the resolutions and the sheet A. Cozens-Hardy J. was so struck by these that, before hearing Cohen's evidence, he intimated that he was in favour of the defendants. That would certainly not be my own view. But Cohen's evidence must be considered. [His Lordship reviewed the evidence, and continued:—]

In this state of the evidence the only conclusion I can come to is that there was some understanding between some of the persons who signed the memorandum of association that Margowski and one or two of his friends should be treated differently from the other shareholders as regards payment on allotment, but that neither the plaintiffs nor any of the other shareholders, except Margowski and his friends, ever knew of or assented to the use they made of their powers to secure for themselves advantages as to payment at the expense of their co-adventurers. Having carefully read the shorthand notes of the proceedings in the Court below, I cannot help thinking that Cozens-Hardy J. placed too much stress on the resolu-

tions, and treated them as conveying more information than they were really calculated to convey or did convey to the plaintiffs. If the learned judge had said that he did not believe the plaintiffs, and that he believed Cohen and Mendelson rather than the plaintiffs, I should feel more difficulty than I do. But the learned judge has not said that he disbelieved the plaintiffs, and I certainly see no reason for doing so. Upon the merits of the case I come to the conclusion that a breach of duty by the directors to the company and the other shareholders in it has been established.

It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the company consists in depriving it of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to *Foss* v. *Harbottle* (1) and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some shareholders on behalf of themselves and the others against the defendants is in accordance with the authorities, and is unobjectionable in form: see *Menier* v. *Hooper's Telegraph Works*. (2) An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present.

Apart, however, from the form of the action, the defendants contended that, having regard to the pleadings and to the calls made and paid since the action was brought, and to what took place at the trial, no relief could now be given to the plaintiffs. I have looked very carefully at the pleadings, and I have observed that Cozens-Hardy J. gave the plaintiffs leave to amend their claim by introducing into it the facts stated in

(1) (1843) 2 Hare, 461. (2) (1874) L. R. 9 Ch. 350.

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their reply to the defence put in by the defendants Margowski and Cohen. Paragraph 6 of this reply raises the point proved at the trial—that the directors practically controlled the voting power of the company. Mr. Eve, who, in the Court below, placed the plaintiffs' case on its true equitable basis, gave up the charges of actual fraud; and, calls having been made and paid, he did not ask for an injunction or a receiver. But he pressed for a declaration to the effect that the defendants ought to have paid up 3*s*. per share on their shares on allotment. This was never abandoned. Having regard to the facts alleged in the plaintiffs' statement of claim and in their reply, and to the leave to amend, and the mode in which the plaintiffs' counsel opened their case, and urged the breach of duty of the defendants, I do not think that the defendants can successfully maintain that they have to meet on appeal a really different case from that which was made in the Court below. The plaintiffs' case was obscured by charges of fraud, and by being based in their pleadings, and to some extent in argument, on legal rather than on equitable grounds. But the facts which constitute the plaintiffs' case are set out in the pleadings, and were fully investigated in the Court below; and Mr. Eve more than once put the plaintiffs' case on its true basis. The plaintiffs' statement of claim is full of charges of fraud. These have been abandoned, and the plaintiffs must pay all the costs occasioned by them. But it does not follow that their action ought to be wholly dismissed: see *Hilliard* v. *Eiffe*. (1) The proper order will be: Allow the appeal and reverse the judgment appealed from. Declare that the three defendants—Margowski, Cohen, and Sworn—were guilty of a breach of their duty as directors in not paying to the company in respect of the shares allotted to them on July 5, 1897, 3*s*. per share, being the amount which they obtained from the other members of the company in respect of shares allotted to them, and let the plaintiffs have liberty to apply for an order for payment if necessary. Order those three defendants to pay the costs of the appeal, and also the costs of the action, except such costs as

(1) (1874) L. R. 7 H. L. 39.

have been occasioned by the charges of fraud, which costs are to be paid by the plaintiffs. The usual set-off to be made as regards these costs.

RIGBY L.J. Two totally different lines of defence were set up by the respective counsel for the directors, on the hearing of this appeal, and the defences are not only different but irreconcilable, if not contradictory.

The first depends on an alleged agreement or understanding that Margowski, Cohen, and Sworn, and a company for which Margowski signed the memorandum, should have time for paying up the money due on the shares taken by them. How much time was to be given is on the parol evidence not very clearly defined, but the time which actually elapsed before any call was made upon them exceeded one year and a quarter, and it expired after the commencement of this action.

This agreement or understanding is said to have been arrived at on June 30, 1897, or, at any rate, on July 5, 1897, at the first meeting of the board of directors of the company.

The second defence throws over altogether this alleged agreement, and depends simply upon the signature of the memorandum and articles of association.

On June 30 there was what is called by the defendants a meeting of the signatories of the memorandum and articles of association. This would be more properly designated an appointment to obtain signatures, since it was not then ascertained who were the signatories and for what number of shares, and in any event there could be no business transacted beyond the obtaining of the signatures, as the signatories had no business to transact. Mr. Rhodes, a solicitor, attended for the purpose of witnessing the signatures, and he did witness each of them.

The company was not incorporated until July 1, 1897.

As the company was not yet formed on June 30, no agreement could possibly be then arrived at which would bind it when formed, and no agreement for the benefit of three out of five directors could be arrived at by a resolution of the board at the meeting of July 5, a fortiori when there is no trace on the

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minutes of the alleged agreement. At most the plaintiffs, who are two of the directors, might be held, if the evidence established such a case, to be personally barred from commencing an action on behalf of themselves and the other shareholders, and it is solely with the object of ascertaining whether they are so barred that it is worth while looking into the evidence at all.

But what actually took place at the so-called meeting of June 30 or at the board meeting of July 5 is, independently of any contradiction, by no means clearly made out by the defendants, on whom is the onus of proving what, if anything, will be of advantage to them. There is no note in writing of what is alleged to have taken place of earlier date than October 18, 1898, made more than a year and a quarter after the event, and pending this action, and entered in a minute of the company of that date, the accuracy of which was challenged at the time.

Indeed, I should infer that it was the deliberate intention of the defendants not to disclose the agreement or understanding by which, as they say, they were entitled to defer the payment for their shares. [His Lordship reviewed the evidence, and continued:—]

I cannot arrive at the conclusion that it was established that the plaintiffs knew anything about any special understanding or agreement which would prevent them from bringing the action, even if knowledge of an understanding or agreement not binding on the company would have prevented them, which I think more than doubtful. That there was in fact no such understanding or agreement which could bind the company, or absent shareholders, is abundantly clear.

The defendants acted throughout, and the case was argued on their behalf, as if directors were justified in exercising the powers vested in them exactly as they pleased, so long as they did not violate the express terms of the powers. The equitable doctrine, well established as it is, that they, as fiduciary donees of the powers, are bound to exercise them so as not to give themselves an advantage over other shareholders, was practically ignored, though since the Judicature Acts it is the

paramount rule, not only in courts of equity but in all courts, and though it was expressly invoked by Mr. Eve on behalf of the plaintiffs in the Court below. Assuming for the moment that the counsel for Dr. Sworn was justified in throwing over the agreement which had been relied upon as to a right on the part of the defendants Margowski, Cohen, and Sworn to postponement of payment on the shares subscribed for by them, let us see how the matter stood on the articles of association alone. Under clause 5 the directors had power to issue and allot shares for such considerations and upon such terms as the board might determine. The defendant directors became at once on the incorporation of the company, by reason of their signature of the memorandum and articles, members of the company for the full number of shares subscribed for by them respectively, including, in the case of Margowski, the shares subscribed for by him on behalf of the Honduras Company, Limited. It was perceived that they would not, under the articles literally applied, become liable for any sums payable on application or allotment, but only, under art. 13, upon calls made in accordance therewith. Accordingly, in addition to the 10 per cent., or 6*d*. per share, charged on application, the directors by the second resolution for allotment passed on July 5 made a further 50 per cent., or 2*s*. 6*d*. per share, payable on allotment, the three defendant directors hoping and expecting to escape liability for this 3*s*. altogether, and only to become liable as and when they made calls on shares. They did not extend this immunity to all the subscribers of the memorandum and articles, but put down on allotment sheet A, in a column indicating what sums were payable on application and allotment, against the shares subscribed for by all the signatories, except the three defendants and the secretary, the sum of 6*d*. on application and 2*s*. 6*d*. on allotment, leaving blanks against the shares taken by the three defendants and the secretary. In this manner the three defendants thought to escape liability in respect of the 3*s*. per share, while charging every shareholder, other than themselves and the secretary, with that amount, which was at once called up. Whether the secretary paid up the 3*s*. per share subscribed for by him does not plainly appear. It is true

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that the three directors remained liable to calls in respect of the whole 5*s.* per share, in accordance with clause 13 of the articles, but they did not exercise the power of making calls, and had not done so to any extent at the time of the commencement of the action. Now, doubtless, the shareholders, having notice of the articles, might have known that it was quite possible that the powers of the directors might be manipulated after this fashion, without violation of the express terms of the articles. But such manipulation gave a clear advantage to the three defendant directors over the other shareholders, who, by virtue of the equitable rule, had a right to suppose that no such advantage would be taken. There would have been no more difficulty, so far as the terms of the articles were concerned, in enforcing payment of the 3*s.* per share by the three defendants than by the three other subscribers of the memorandum and articles who were called upon to pay it. In fact, they had only to renounce the benefit enabling them, according to the letter of the articles, to escape payment, and the conclusion would have followed. Counsel for the defendant Sworn argued vehemently that, when once it came to a question of waiving rights, the defendants must succeed, as they could not be compelled to waive them. If waiver were necessary to enable them to come on equal terms with the other shareholders, they were bound to waive. Otherwise, by virtue of an immunity which they themselves had provided for by the terms of the articles which they introduced, they would evade the paramount duty of acting equally between themselves and the other shareholders. Therefore, without an agreement in their favour the defendants would be liable for the 3*s.* per share.

But the defendants did not even profess to be acting on the articles alone. They set up throughout the action that they had a separate agreement for the benefit of the three, and the three only, and the minute of October 18, 1898, and the evidence put forward in support of it, have no meaning on any other hypothesis. As I have already pointed out, they represented on July 5 that they had made an offer to subscribe for shares, which was still open and was accepted, and that shares were allotted to them accordingly, and, although counsel for

Dr. Sworn, after the evidence had all been read, and the argument based upon it had been concluded, tried to withdraw that suggested agreement, it was in my judgment altogether too late to do so. It is evident that, with an agreement such as that suggested, the question whether the defendant directors had fairly and properly exercised their trust powers would have been very different from what it would have been in the absence of such an agreement. It would not have been possible for the defendant directors to say with any effect that they had altogether disregarded the agreement in their favour and acted independently of it, and on no other hypothesis could they have sustained the proposition that they had fairly, and without leaning one way or another, exercised the powers of regulating the amounts payable respectively on application and allotment and by call. My conclusion is that there was a failure on the part of the three director defendants to exercise their powers as they ought to have been exercised, and that they ought to be held to the representation made by them on July 5, and to be taken to have charged themselves with 3*s*. per share, as they charged the other signatories of the memorandum and the applicants for shares independently of the memorandum.

The learned judge seems to have thought that the acquiescence of the plaintiffs Alexander and Gibbs in the two resolutions for the allotment of shares was of itself sufficient to disentitle them to sue; but in this conclusion I am not able to concur. This exclusive reliance on the resolutions accounts, as it seems to me, for the failure of the learned judge to examine more carefully into the evidence as to a separate understanding or agreement. I do not think that he gave sufficient weight to the equitable rule.

As to the pleadings and the points open to the defendants for argument on the appeal and the costs, I concur with the Master of the Rolls.

VAUGHAN WILLIAMS L.J., after stating the facts and referring to the evidence, continued:—The evidence makes it extremely improbable that any such agreement was made as is alleged.

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But assume that it was made. The agreement was without consideration, and was in fact no more than an exercise by the directors of the power vested in them by clause 13 of the articles of making or abstaining to make calls on particular shareholders, and in my judgment the resolution, whether taken in conjunction with the allotment sheet or not, does not amount to an agreement for postponement of any part of the liability of the signatories in respect of the shares which they had taken by signature. It amounts at the most to an abstinence by the directors from calling up by the resolution of allotment the 3*s*. per share which the ordinary applicants were called on to pay.

If the resolution goes further, it was one which the directors had no right to make in their own favour, and the mere fact that they purported so to do would, without further evidence of fraudulent or improper motive, be sufficient to negative any suggestion that such a resolution was passed in the honest exercise of their judgment by the directors. For a director cannot use his power of making calls for his own interests: see *Gilbert's Case*. (1)

It is impossible to read the evidence without seeing that the case really set up by the defendants was that they signed the memorandum on the express terms that this liability on the shares should be practically postponed, and that any call made which was inconsistent with that postponement would be a call which the directors, whoever they might be, ought not to make, because it would be inconsistent with an agreement between the company and the signatories binding on the company.

It is true that this is not the case pleaded. The case pleaded is merely that the signatories took their shares on the terms that nothing should be payable upon application or allotment, but that those shares should only be paid up by means of calls made by the directors as and when they should be required for the purposes of the company. But, inasmuch as urgent want of money by the company cannot in fact be denied,

(1) L. R. 5 Ch. 559.

the directors were necessarily driven to justify their not calling up the 3*s.* from themselves on the ground of the alleged agreement binding the company not to do so.

Their doing this would have provided (having regard to the large number of shares taken by the signatories as such) a greater sum than the 1*s.* per share call made on the ordinary shareholders, and this even though the call on the signatory shareholders had been limited to 1*s.* a share.

The outcome, in my judgment, is that there was no agreement binding on the company for postponement of the payment by the signatories of any part of the sums which they were bound to pay on their shares; and that any refraining by the directors from calling up from the signatories the sums necessary to put them on a level with the other shareholders, on the alleged ground that there was in existence an agreement which entitled the signatories to a postponement of their liability, was based on a misconception by the directors as to the existence of such an agreement binding the company, and was a breach of trust committed by them for their own interest.

If, on the other hand, the directors seek to justify their omission to call up the 6*d.* and 2*s.* 6*d.* per share from the signatories as an exercise of their discretion, it seems to me that, having regard to the want of money by the company, and the setting up by the directors of the alleged agreement to postpone as a justification for not putting themselves as signatories on a level with the other shareholders, the action of the directors cannot be regarded as an exercise of their discretion at all.

They considered that the so-called agreement precluded the exercise of any discretion in the matter.

It is said that they could not have called up the 6*d.* and the 2*s.* 6*d.* per share except by calls of 1*s.* made with proper intervals according to the articles. Even if this were so, they had ample opportunity in this manner to call up the 3*s.* per share, and they have not done it.

The last point with which I have to deal is the suggestion that the plaintiffs, having been privy to the resolutions of

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July 5, cannot, even though suing on behalf of themselves and others, impeach the resolutions to which they were privy. I say nothing about the antecedent alleged agreement, for, as I have already said, I do not believe this was communicated to the plaintiffs. The answer, so far as the resolutions are concerned, is that the action does not impeach those resolutions properly construed, for so construed they do not involve any agreement for the postponement of any liability of the signatories in respect of these shares.

I think, therefore, that the judgment of Cozens-Hardy J. was wrong, and that the appeal ought to be allowed with costs here and below.

As to the pleadings, whatever was originally prayed, ultimately all that was asked was a declaration; and Cozens-Hardy J., as I understand, said that he would make the necessary amendments. If they were not actually made, these amendments, looking at the issues really fought at the trial, ought, in my opinion, to be made now.

Solicitors: *White & De Buriatte; Spyer & Sons; Haynes & Claremont.*

W. L. C.

MUTTON *v.* PEAT.

C. A. 1900 *April* 25.

[1896 M. 2026.]

Banker and Customer—Stockbroker—Clients' Securities Deposited to Secure Broker's Indebtedness—Several Accounts—Appropriation of Payments—Rights of Owner of Deposited Securities.

Stockbrokers had two accounts with their bankers—a current account and a loan account. The brokers became defaulters on the Stock Exchange on January 13, and were on January 24 adjudicated bankrupts. At the time of their stoppage there was on the current account a balance of 1362*l.* 10*s.* to their credit, and a balance of 7500*l.* was due from them to the bankers on the loan account. They had deposited with the bankers as security bonds and shares belonging to some of their clients. This deposit was made without the authority of the clients, but the bankers did not know that the deposited securities were not the property of the brokers. The deposit was made (as the Court of Appeal held, differing in this respect from Byrne J.) to secure the general indebtedness of the brokers to the bankers, and not merely their indebtedness on the loan account. After the stoppage of the brokers the bankers realized the deposited securities, the proceeds of which were, together with interest until sale, more than sufficient to cover the balance due on the loan account, and there remained in their hands a sum exceeding the credit balance on the current account:—

Held, that the two accounts must be treated as one, and that it was the duty of the bankers to apply the 1362*l.* 10*s.* due from them on the current account in reduction of the 7500*l.* due to them on the loan account, and to use the deposited securities to satisfy only the difference between those two balances:

Held, therefore, that the sum remaining in the bankers' hands belonged to the owners of the deposited securities.

Two days before the stoppage of the brokers a client had sent them a cheque to pay for some stock which they had purchased for him. This cheque was paid to their current account, and the amount of it formed part of the 1362*l.* 10*s.* The purchase was not completed by the brokers:—

Held, that the client had no equity as against the owners of the deposited securities to be repaid the amount of his cheque out of the 1362*l.* 10*s.*

Decision of Byrne J., [1899] 2 Ch. 556, reversed on a conclusion of fact.

APPEAL from a decision of Byrne J. (1)

Messrs. Tatham & Co., stockbrokers, had two accounts with Messrs. Glyn & Co., their bankers—an ordinary current account and a loan account.

(1) [1899] 2 Ch. 556.

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On January 11, 1896, Tatham & Co. paid to the credit of their current account a sum of 790*l.* 4*s.* 6*d.*, which they had received from a client named Parker. By his instructions they had purchased some stock for him, and the 790*l.* 4*s.* 6*d.* was the amount of the purchase-money, commission, and stamps. He on January 11 sent them a cheque for the amount to enable them to pay for the stock, and they paid the cheque in the ordinary course to the credit of their current account. On January 13, 1896, Tatham & Co. were declared defaulters on the Stock Exchange. On January 21 a receiving order was made against them, and on January 24 they were adjudicated bankrupts.

On January 13, 1896, the bankers closed Tatham & Co.'s current account, and transferred the balance then standing to the credit of that account, namely, 1362*l.* 10*s.*, to a new account opened in the name of Tatham & Co. in a book kept by the bankers which was devoted to bankruptcies and liquidations. This balance of 1362*l.* 10*s.* included the 790*l.* 4*s.* 6*d.* paid by Parker. In consequence of the default of Tatham & Co. the stock purchased for Parker was never delivered by the jobber with whom the contract had been made. The balance of 1362*l.* 10*s.* also included a sum of 145*l.* 9*s.* 8*d.* This was the quarterly dividend upon a sum of stock which belonged to the trustees of the will of a Mr. Cutler. It had been arranged that H. E. Tatham, one of the partners in Tatham & Co., should be appointed one of the trustees of the will to fill up a vacancy. The deed of appointment had not been executed, but the stock had been transferred into the joint names of the continuing trustees and H. E. Tatham, and he on January 6, 1896, received the warrant for the quarterly dividend of 145*l.* 9*s.* 8*d.*, and, after indorsing it, paid it to the current account of his firm, and it had not at the time of their default been paid over to the cestui que trust who was entitled to it.

It appeared from the loan account of Tatham & Co. in the loan-book of the bankers that on December 30, 1895, a sum of 7500*l.* was owing on that account to the bankers, and that it would become due in the ordinary course of dealing on January 16, 1896.

As security for their indebtedness to the bankers Tatham & Co. had deposited with them some bonds which belonged to some of their clients. This deposit was made without the knowledge or sanction of the clients, but the bankers had no notice that the deposited bonds were not the property of Messrs. Tatham, or that any other person than they had any interest in the bonds. Among the bonds so deposited were some which belonged to the plaintiff.

There was no evidence of any agreement that the bonds should be deposited as security only for the loan account, and (as the Court of Appeal held) they were deposited as security generally for the indebtedness of Messrs. Tatham to the bankers.

On January 20, 1896, the bankers proceeded to sell some of the deposited bonds. They sold some of them for money paid on that day, and entered into contracts (to be completed at later dates) for the sale of others. The plaintiff's bonds were some of those sold. On January 20, 1896, the bankers credited Tatham & Co.'s new account (called the "liquidation account") with sums amounting to 3342*l.* 15*s.*, being the proceeds of the sale of some of the bonds, and on January 22, 1896, they debited the same account as follows: "Loan (part) discharged, 3340*l.*; twenty days' interest to January 20, 3*l.* 13*s.* 2*d.*"

On January 24, 1896, the same account was credited with 574*l.* 10*s.* in respect of a further sale of bonds, and was debited as follows: "Loan (part) discharged, 570*l.*; twenty days' interest, 15*s.*"

Further sums were received by the bankers on January 25, 27, and 30, 1896, from the sale of bonds, and all those sums were duly credited to Tatham & Co. in the liquidation account, and on the other side of the same account there appeared this entry under the date January 30: "Loan (balance) discharged, 3590*l.*; thirty days' interest, 5*l.* 17*s.* 11*d.*"

It appeared from this account that (so far as entries in the bankers' books shewed) no part of the balance of 1362*l.* 10*s.* transferred from the current account was applied in reduction of the balance of the loan account, and that the proceeds of the sale of bonds were specifically appropriated in discharge of the balance due on the loan account, leaving a total balance of

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1485*l.* 3*s.* 1*d.* in the hands of the bankers, including the 1362*l.* 10*s.*

On March 20, 1896, the bankers wrote to the solicitors acting for the Cutler trustees to the effect that the balance in their hands at the time of the suspension of Tatham & Co. was not needed for the repayment of advances, which were met by the sale of securities, and that they retained the amount of that balance pending possible judicial decision.

By this action the plaintiff claimed a declaration that the 1485*l.* 3*s.* 1*d.* remaining in the hands of the bankers represented as to part thereof the net proceeds of the sale of his bonds by Tatham & Co., and that he was entitled to have paid to him so much of those moneys as represented the purchase-moneys received for his bonds.

Parker claimed to have the 790*l.* 4*s.* 6*d.* paid to him out of the balance of 1362*l.* 10*s.* on the current account, and the Cutler trustees claimed to have the 145*l.* 9*s.* 8*d.* paid to them out of the same balance.

The trustee in the bankruptcy of Tatham & Co., the bankers, Parker and the Cutler trustees were defendants to the action, and also some other persons who either made claims against the balance in the hands of the bankers, or were the owners of bonds which had been sold by the bankers.

Byrne J. held that Parker was entitled to be paid his 790*l.* 4*s.* 6*d.* out of the balance of 1362*l.* 10*s.* to the credit of the current account, and said that his decision would apply to the other claimants to the cash balance if they succeeded in tracing their moneys into the fund.

The plaintiff appealed.

Levett, Q.C., and *Hull*, for the plaintiff. The effect of the decision is that Parker has got the benefit of the plaintiff's securities. The bankers were entitled to apply, and they did apply, Parker's money in reduction of the debt for which the securities were deposited with them, they having no notice that the brokers had received the money in a fiduciary capacity. Parker has no equity as against the owners of the deposited securities. When once the bankers had appropriated the balance

due from them on the current account to meet the balance due to them on the loan account, they could not alter the appropriation. So soon as they had closed the current account the amount of the indebtedness of the brokers to them was only 6137*l.* 10*s.*, i.e., the difference between 7500*l.* and 1362*l.* 10*s.* The rule in *Clayton's Case* (1) applies to the liquidation account. The evidence and the form of the liquidation account shew that the bankers did in fact appropriate the 1362*l.* 10*s.* to meet the debt due on the loan account.

When there are several accounts between a banker and his customer, they form in reality only one account, and the banker is entitled so to treat them, and, in the absence of any special contract, to treat securities deposited with him by the customer as security for the general balance due by the customer: Grant's Law of Banking, 5th ed. pp. 249, 250; *In re European Bank* (2); *Pedder* v. *Preston Corporation* (3); *Thomas* v. *Howell.* (4)

George Lawrence, for Parker. This is not a case merely between banker and customer. No doubt as between banker and customer the former is entitled, in the absence of agreement to the contrary, to apply any property of the customer which is in his hands to repay what is due to him from the customer. But here the question is, what are the rights as between two third parties both of whom are claiming under the customer. The bankers' books shew that they have not in fact appropriated the 1362*l.* 10*s.* to meet the debt due to them on the loan account, and it is submitted that they had no right so to appropriate the 1362*l.* 10*s.* If the bankers had done so, the interest charged in the liquidation account on the balance due on the loan account would be too large. If the rule in *Clayton's Case* (1) could apply at all, it is excluded by actual appropriation. Parker's money was paid to the brokers for the express purpose of taking up the stock which they had purchased for him.

[LINDLEY M.R. His cheque was not dealt with improperly by the brokers.

(1) (1816) 1 Mer. 572, 608; 15 R. R. 161.
(2) (1872) L. R. 8 Ch. 41.
(3) (1862) 12 C. B. (N.S.) 535.
(4) (1874) L. R. 18 Eq. 198.

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RIGBY L.J. The wrongful act was the not paying for the stock.]

The rights of third parties are recognised: *Marquis of Bute* v. *Cunynghame* (1); *In re Dunlop.* (2) The bankers have so dealt with their customers by not appropriating the balance on the current account as to enable third parties to treat the two accounts as separate accounts, though, as between the bankers and the brokers, they were one. Otherwise, the object of keeping separate accounts would be defeated.

Kenyon Parker, for the Cutler trustees. The 145*l.* 9*s.* 8*d.* was trust money, and it forms part of the 1362*l.* 10*s.*, which remains intact. This trust money can be followed by the persons entitled to it. Even if it was the duty of the bankers to appropriate the 1362*l.* 10*s.* to meet the balance due upon the loan account, they have not done so, and, that being so, the only remedy of the plaintiff is by an action against them. He is not entitled to take the trustees' money.

LINDLEY M.R. I think the point taken for the appellant is unanswerable when once it is grasped. I agree with the respondents' counsel that the bankers had two accounts with Tatham & Co., the loan account and the current account, and that when Tatham & Co. became defaulters, on January 13, 1896, and the bankers closed the current account, there was 1362*l.* 10*s.* standing to the credit of Tatham & Co. on that account. I agree also that the accounts were not then closed by transferring the 1362*l.* 10*s.* to the loan account, thereby reducing the amount due on that account. The 1362*l.* 10*s.* was carried to the bankruptcy or liquidation account kept by the bankers. The respondents' counsel are therefore right when they say that, according to the bankers' books, the 1362*l.* 10*s.* was carried to a separate account in those books. But what follows from this? What was the plaintiff's position? His bonds had been deposited with the bankers in December, 1895. But what were the terms of that deposit? Everything in this case turns, as it seems to me, upon that. There was no special agreement in writing about it; the bonds were deposited as security for the indebtedness of Tatham & Co.

(1) (1826) 2 Russ. 275, 299; 26 R. R. 72. (2) (1882) 21 Ch. D. 583.

to the bankers. The bonds were a security to the bankers for what Tatham & Co. owed them, including of course what Tatham & Co. owed them on the loan account. The important thing, and, to my mind, the key to the case, is this, that there was no agreement, at the time when the bonds were deposited, that the two accounts—the loan account and the current account—should be kept separate, so that the indebtedness for which the bonds were deposited should be ascertained by looking at the loan account alone. In other words, there was no agreement to the effect that the deposited bonds should be a security for anything except that which, on taking an account between Tatham & Co. and the bankers, under all heads of account between them, should ultimately be found due from Tatham & Co. to the bankers. That arrangement had its advantages and also its disadvantages. That there were then two accounts is plain, and I am satisfied that the 1362*l.* 10*s.* was as a matter of book-keeping treated in the way I have mentioned, for, notwithstanding an affidavit by the bank manager in which he treats the 1362*l.* 10*s.* as reducing the indebtedness on the loan account, the mode in which the calculation of interest on that account was made shews that that was not really so.

What then are the rights of the plaintiff as regards his bonds? He does not deny the right of the bankers to treat the bonds as security for the amount of the indebtedness of Tatham & Co. What is that amount? It is the amount, taking the deposit account and current account together (you cannot separate them), which is due to the bankers on the two accounts. With that amount his bonds must stand charged. I do not care how the bankers may have manipulated their books or how many accounts they may have kept. When you come to ascertain what is the amount due from Tatham & Co. to the bankers the question admits of only one solution—it is the balance due on the loan account after deducting the 1362*l.* 10*s.* The plaintiff says, "Give me the proceeds of my bonds when that balance has been satisfied." What answer can the respondents have to that claim? This is one of those unfortunate cases in which the Court has to decide on which of several innocent persons a loss must fall; but when once

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you grasp the principle that the bonds were deposited for the amount which Tatham & Co. should be found to owe to the bankers, it is impossible to say that that amount is to be ascertained in any other way than by setting the one account against the other. It is the right of the owner of the deposited bonds to have that done and to say, "You cannot hold my bonds except as security for the ultimate balance due to you." There is no answer to this claim, and neither of the respondents has any right to dispute it. It is no answer to say that, looking at the accounts as they have been kept, you will find that the respondents' moneys are still in the hands of the bankers. I think the learned judge has not gone wrong on any question of law; but he has decided the case upon the theory, which in my opinion is erroneous in fact, that the plaintiffs' bonds were deposited to secure the brokers' loan account exclusively, without reference to their current account. This was not so, for there was no agreement which entitled either the bankers or Tatham & Co. to say that the deposited bonds should be treated as security for what was due on the loan account alone. The appeal must be allowed.

RIGBY L.J. I may assume for the purpose of my decision that there has been de facto no appropriation by the bankers of the balance of 1362*l.* 10*s.* But what is the effect of that? It seems to me that it does not matter in the least whether they appropriated it or not. I think we are bound to say that the bankers ought to have appropriated the 1362*l.* 10*s.* in reduction of the 7500*l.* loan, or perhaps it would be more correct to say that they were bound to allow the 1362*l.* 10*s.* in account whether they appropriated it or not, and even if they endeavoured not to appropriate it. The security was given for the indebtedness of Tatham & Co. to the bankers and for nothing else, and that indebtedness was the 7500*l.* minus the 1362*l.* 10*s.*, and that only.

COLLINS L.J. I am of the same opinion.

Solicitors: *Longbourne, Stevens & Co.; Bower, Cotton & Bower, for H. B. Bradley, Folkestone; Foyer & Hordern.*

W. L. C.

VIDITZ *v.* O'HAGAN.

C. A. 1900

[1896 V. 615.]

April 25, 26, 30.

Marriage Settlement—Female Infant—Ratification—Repudiation—Marriage with Foreigner—Change of Domicil by Marriage—Operation of English Law.

Prior to the marriage in 1864 of an Irish lady under twenty-one with an Austrian, marriage articles in English form were executed by her and her intended husband, by which it was declared and agreed by and between the parties thereto that, in case the marriage should take place, the then personal property and certain after-acquired personal property of the lady should be vested in trustees upon the usual trusts of an English marriage settlement. After the marriage the husband retained his Austrian domicil. In 1880 a settlement in English form, which purported to be made in pursuance of the articles, was executed by the husband and wife in Paris. The wife afterwards executed appointments of new trustees of the settlement, and in 1889 she exercised in favour of one of her daughters a power of appointment reserved to her by the settlement. In 1893 the husband and wife executed in Austria, in accordance with Austrian law, a notarial act, by which they purported to revoke and annul the marriage articles and the settlement of 1880, and to vest in the wife the unrestricted administration of all her property. In 1896 the husband and wife and their four children (all of whom had attained twenty-one) brought an action against the trustees in the Chancery Division, claiming a declaration that, by virtue of the notarial act of 1893, the marriage articles and the settlement were wholly cancelled and annulled and were void by Austrian law.

By Austrian law a husband and wife have a right to revoke their marriage contract, notwithstanding the birth of issue and acts of ratification, and this right of revocation cannot be waived, and is not lost by lapse of time :—

Held, that, inasmuch as upon her marriage the wife acquired the Austrian domicil of her husband and became subject to Austrian law, she never could ratify the settlement or deprive herself of the right to repudiate it, the result being that she never had the power, either before or after her marriage, of making an irrevocable contract.

Consequently the English doctrine, that the voidable contract of an infant will bind him if he does not repudiate it within a reasonable time after he attains twenty-one, had no application :—

Held, therefore, that the wife was not bound by the marriage articles or by the settlement, and that the revocation by the notarial act of 1893 was effectual.

Decision of Cozens-Hardy J., [1899] 2 Ch. 569, reversed.

APPEAL against the decision of Cozens-Hardy J. (1)

In November, 1864, the Honourable Frances Netterville,

(1) [1899] 2 Ch. 569.

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then aged eighteen, the only child of Viscount Netterville, an Irish Peer, was married at Bern in Switzerland to Mr. Viditz, an Austrian. By marriage articles under seal in English form, dated November 24, 1864, and executed before the marriage at the British Legation at Bern, and made between Mr. Viditz of the first part, the Honourable Frances Netterville of the second part, trustees of the third part, and Viscount Netterville of the fourth part, it was declared and agreed by and between the parties thereto, and Mr. Viditz thereby covenanted with the trustees, that, in case the intended marriage should take place, all such personal property as the intended wife was then entitled to in possession, reversion, remainder, or expectancy, and also all such sums of money, stocks, funds, or other personal property, whether in possession, remainder, or expectancy, as might at any time during the joint lives of the husband and wife come to the wife, or to her and her husband in her right, under any will, settlement, or by gift or otherwise (save and except pecuniary legacies), should be assured to and vested in the trustees upon the usual trusts for the benefit of the wife for her life, for her separate use with a restraint upon anticipation, and after her death upon trusts for the issue of the marriage, with an ultimate trust for Viscount Netterville absolutely. And it was further declared that in the settlement to be made in pursuance of the articles there should be inserted a covenant on the part of Mr. Viditz to settle all real property (if any) to which the wife then was or to which she or her husband in her right should at any time during the intended coverture become beneficially entitled, whether in possession or reversion, upon the trusts thereinbefore declared and in the settlement intended to be declared in respect of the personal property of the wife.

At the date of her marriage Mrs. Viditz was entitled under the marriage settlement of her parents, contingently on her attaining twenty-one, to a sum of 6000*l.* on the death of her mother, and to a sum of 2000*l.* on the death of her father.

Mrs. Viditz attained twenty-one on November 5, 1867. In 1870 she on the death of her mother became entitled in possession to the 6000*l.*, and that sum was paid to the trustees of the articles of 1864 and was invested in Consols.

On July 12, 1880, a deed in English form, purporting to be a settlement in pursuance of the articles of 1864, was executed in Paris, Mr. and Mrs. Viditz, her father, and the trustees being all parties to it. It contained a recital of the investment in Consols, and it declared trusts of that sum similar to the trusts declared in the articles of 1864. It contained also a covenant to settle after-acquired personal property of Mrs. Viditz differing from the covenant in the articles of 1864, inasmuch as pecuniary legacies were not excepted.

In 1880, and again in 1881, Mrs. Viditz was a party to the appointment of new trustees of the settlement created by the deeds of 1864 and 1880.

In 1882 Viscount Netterville died, and Mrs. Viditz thereupon became entitled in possession to the 2000*l.*, and that sum was paid to the trustees of the settlement and was invested by them.

Viscount Netterville by his will gave all his property, which consisted chiefly of real estate in Ireland, to charities. Litigation ensued, and Mrs. Viditz sought to set aside the will. In the result a compromise was effected in March, 1884, under which a sum of 13,000*l.* was to be settled upon her and her children, and a sum of 5000*l.* was to be paid to her. No part of this sum had been received by her when the action was commenced. In May, 1884, Mrs. Viditz mortgaged the 5000*l.* In 1889 Mrs. Viditz, under a power reserved to her by the settlement, appointed one-fourth part of the trust funds to one of her daughters on her marriage, and the appointed share was afterwards mortgaged by the mother and daughter.

In January, 1892, Mrs. Viditz became entitled to a legacy of 2000*l.* under the will of an aunt, and in November of the same year she was for the first time informed that the 5000*l.* and the legacy of 2000*l.* would have to be paid to the trustees of the settlement. She took advice, and in November, 1893, she and her husband executed in Austria, and in accordance with Austrian law, a notarial act, by which they purported to revoke and annul the deeds of 1864 and 1880, and to vest in Mrs. Viditz the unrestricted administration of all her property.

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In 1896 Mr. and Mrs. Viditz and their four children (all of whom had attained twenty-one) commenced this action against the trustees of the deeds of 1864 and 1880, claiming a declaration that, by virtue of the notarial act of November, 1893, the marriage articles of 1864 and the settlement of 1880 were wholly cancelled and annulled, and were void by Austrian law, and in the alternative that the settlement of 1880 was void, or that Mrs. Viditz was entitled to repudiate it, so far as the 5000*l.* and the legacy of 2000*l.* were concerned.

Expert evidence was given to the effect that by Austrian law the marriage articles of 1864 and the settlement of 1880 would be governed by that law, and were void, not having been executed as notarial acts; that children do not acquire vested interests under the marriage contracts of their parents, but only an expectancy; that a husband and wife have a right to revoke their marriage contract, notwithstanding the birth of issue and acts of ratification, and that this right of revocation cannot be waived and is not lost by lapse of time. There was also evidence that by the law of France the deed of 1880 was void, because it was not executed as a notarial act.

Cozens-Hardy J. held that the marriage articles were valid and were governed by English law, and that the wife, not having repudiated them within a reasonable time after she had attained twenty-one, was absolutely bound by them. He dismissed the action so far as it sought a declaration that the articles and the deed of 1880 were void, but directed that the deed of 1880 should be rectified so as to exclude all pecuniary legacies.

The plaintiffs appealed.

Dicey, Q.C., and *Micklem, Q.C.*, for the plaintiffs. No reliance is placed on the fact that the settlement was executed in Switzerland; it must be treated as an English settlement. It is admitted also that a marriage settlement made by an English infant is only voidable, not void. But the capacity to contract by marriage articles depends on the lex domicilii.

Under the circumstances, Mrs. Viditz was not bound by the covenant of her husband to settle her after-acquired per-

sonalty which is contained in the articles of November, 1864. The covenant purports to bind the husband only. The question whether a wife is bound by a covenant which is nominally entered into by the husband only, turns upon very fine distinctions. It is a question of evidence, or rather of construction: *Ramsden* v. *Smith* (1); *Dawes* v. *Tredwell* (2); *In re Smith* (3); *In re Haden* (4); Underhill on the Interpretation of Wills and Settlements, pp. 243 et seq. The question is one of intention. All such contracts must be construed with reference to the circumstances under which the husband and wife are intending to live and the country of their domicil. The English rule of construction cannot apply to these articles, which, though they are in a sense an English contract, were entered into by a foreigner who was domiciled abroad, and who contemplated retaining his foreign domicil. The covenant should be read in its natural sense as binding the husband only. The object of the covenant was that the husband should not take advantage of property of the wife which would accrue to him under English law.

[LINDLEY M.R. By the articles "it was declared and agreed by and between the parties." If the husband's covenant were struck out, there would still be an agreement by the wife that her after-acquired personalty should be settled. Of course that agreement did not bind her as she was an infant, and the question arises whether she has ratified the articles.]

The document must be looked at as a whole.

But, assuming that there was an agreement by the lady, still it was a voidable agreement. *Van Grutten* v. *Digby* (5), on which Cozens-Hardy J. to a great extent founded his decision, has no application, except so far as it shews that marriage articles executed abroad may be governed by English law. That is not disputed. But that case has nothing to do with the question of ratification. The wife in that case was not an infant when the settlement was executed. It is well established that the capacity to contract (more particularly as

(1) (1854) 2 Drew. 298.
(2) (1881) 18 Ch. D. 354.
(3) W. N. (1900) 75.
(4) [1898] 2 Ch. 220.
(5) (1862) 31 Beav. 561.

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regards marriage contracts) depends on the law of the domicil: Dicey's Conflict of Laws, pp. 543 et seq.; *Sottomayor* v. *De Barros* (1); *Cooper* v. *Cooper*. (2) If the wife had been domiciled in England after the execution of the articles, no doubt her ratification of them or her non-repudiation within a reasonable time would have bound her. But on her marriage she acquired the Austrian domicil of her husband, which she has ever since retained, and therefore the effect of her acts subsequent to the execution of the articles must be determined by Austrian law. The evidence shews that such a contract, even if it had been valid under Austrian law, would have been revocable at any time by the husband and wife. The contract would, in fact, have been invalid ab initio. The settlement of 1880 was not binding under Austrian law, because it was made by two Austrian subjects, and it provided for a destination of the wife's property which was inconsistent with Austrian law. Then in 1893 there was the notarial act revoking the settlement. This was in accordance with Austrian law. When the wife upon her marriage changed her domicil, she became by that change incapable of ratifying her voidable contract, and that contract was thus prevented from ever becoming binding on her. She lost the power of ratifying it either expressly or by implication: *Cooper* v. *Cooper* (2); *Seaton* v. *Seaton* (3); *Harvey* v. *Farnie*. (4) The change of domicil got rid of the English doctrine that the voidable contract of an infant must be repudiated if at all within a reasonable time after he attains twenty-one. If ratification has become impossible, no inference can be drawn from its absence.

The right to repudiate a settlement made by an infant is a distinct right as regards each item of property comprised in it: *Smith* v. *Lucas*. (5) The validity of that decision is not affected by *Edwards* v. *Carter*. (6) Consequently the wife's rights as regards the 5000*l*. are not affected by the settlement of 1880. The case must be dealt with according to the law of husband

(1) (1877) 3 P. D. 1, 5; (1879) 5 P. D. 94.
(2) (1888) 13 App. Cas. 88.
(3) (1888) 13 App. Cas. 61.
(4) (1882) 8 App. Cas. 43.
(5) (1881) 18 Ch. D. 531.
(6) [1893] A. C. 360.

and wife as it stood in 1880, before the Married Women's Property Act, 1882.

Again, assuming that Mrs. Viditz is now bound by the agreement to settle her after-acquired personal property mentioned in the articles of 1864, still this 5000*l.* is not within the agreement. It did not come to her "under any will, settlement, or by gift." Nor does the addition of the words "or otherwise" make any difference. Those words point at something gratuitous, and do not include anything which has been earned. This 5000*l.* may be said to have been earned by giving up the claim of Mrs. Viditz to her father's real estate: *Finlay* v. *Darling* (1); *Churchill* v. *Denny*. (2) As to the effect of general words and the rule of "ejusdem generis," see *In re Stockport Ragged, Industrial and Reformatory Schools* (3); *Anderson* v. *Anderson*. (4) The 5000*l.* ought not to be treated as personalty; it was really part of the proceeds of the sale of the father's real estate, and, if it is affected at all by the articles of 1864, it is affected only by the covenant to settle real estate of the wife, and that covenant binds only the husband.

Hughes, Q.C., and *Ingpen, Q.C.*, for the trustees of the settlement.

[LINDLEY M.R. As a matter of construction we all think that the wife was bound by the agreement to settle her after-acquired personalty.]

As to the property comprised in the agreement, the intention evidently was to sweep into the settlement as much as possible, and for that reason the words "or otherwise" were inserted. Even if those words should be limited to property ejusdem generis with what has gone before, it would be difficult to imagine anything more of that character than this 5000*l.* The 5000*l.* is practically a sum which comes to the wife upon an agreed intestacy. The 5000*l.* is therefore included in the agreement.

As to the effect of the change of domicil by the marriage, *Van Grutten* v. *Digby* (5) has not been questioned; but for the

(1) [1897] 1 Ch. 719.
(2) (1875) L. R. 20 Eq. 534.
(3) [1898] 2 Ch. 687.
(4) [1895] 1 Q. B. 749.
(5) 31 Beav. 561.

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wife's infancy, the settlement would clearly be binding on her as an English settlement. It is said that from the time of her marriage she became incapable by Austrian law of ratifying it. The evidence is not clear as to Austrian law. Under English law a contract by an infant is only voidable, not void. If the attempted revocation of 1893 is effectual, it must follow that the wife could revoke her contract at any time, however distant, after she had attained twenty-one. But in *Edwards* v. *Carter* (1) it was held that a settlement by an infant must be repudiated within a reasonable time after he has attained twenty-one, and if this is not done the settlement becomes absolutely binding on him.

[LINDLEY M.R. Can that doctrine apply to a case in which the infant had, neither before nor after her marriage, capacity to make the settlement?]

If she was unable to repudiate the contract the contract must stand, and *Cooper* v. *Cooper* (2) is not inconsistent with *Edwards* v. *Carter*. (1) In *Cooper* v. *Cooper* (2) the House of Lords were not considering the distinction between a void and a voidable contract.

The law which governs a contract is the lex loci contractus, and everything which arises out of the contract must be governed by that law: *Van Grutten* v. *Digby* (3); Dicey's Conflict of Laws, pp. 569, 570; and by English law an infant's contract, unless it is repudiated by him within a reasonable time after he attains twenty-one, binds him absolutely. In *Cooper* v. *Cooper* (2) the decision was based on the principle that a contract which cannot be for the benefit of an infant is void; it need not be repudiated by the infant when he attains twenty-one. In order that it may bind him there must be confirmation, that is, a new contract. If the contract can be for the infant's benefit, it binds him unless he repudiates it within a reasonable time. A change of domicil does not alter the law which governs a contract: *De Nicols* v. *Curlier*. (4) The right to repudiate a contract arises out of the contract, and in this respect it differs from a right to affirm a contract: *In re*

(1) [1893] A. C. 360.
(2) 13 App. Cas. 88.
(3) 31 Beav. 561.
(4) [1900] A. C. 21.

Hodson. (1) A married woman can, notwithstanding a change of domicil, exercise a power of appointment in a manner inconsistent with the law of her new domicil: *Pouey* v. *Hordern.* (2)

[COLLINS L.J. If the rule of English law, that an infant's contract must be repudiated within a reasonable time after he attains twenty-one, is not a part of the contract, but is an incident of the status, does not that rule cease to apply when the status is changed?]

It is not a question of status, but of an implied right under the contract. It is part of the contract itself: *Burnaby* v. *Equitable Reversionary Interest Society.* (3)

As to the construction of the articles, the 5000*l.* was no doubt proceeds of real estate, but it was money, and it falls within the words of the agreement to settle.

Dicey, Q.C., in reply. All the parties knew from the first that the husband and wife contemplated living after their marriage in Austria under Austrian law—a law which forbade the wife from making an irrevocable settlement of her property. When she married she was incapable under English law of making a binding contract, and when she had changed her domicil upon her marriage she could not get rid of a capacity to revoke the settlement; in other words, it could not become binding on her either by express ratification or by non-repudiation within a reasonable time after she attained twenty-one. The legal effect of acts done by her subsequently to her attaining twenty-one was altered by her change of domicil.

G. D. Lynch, for the mortgagees of the 5000*l.*

A. Lockyer Ingpen, for the mortgagees of the daughter's appointed share.

LINDLEY M.R. Two questions arise. The first is, whether, upon the true construction of the marriage articles of November, 1864 (assuming that they are binding on the wife), the sum of 5000*l.*, which is payable to her under the compromise of the probate action, is or is not comprised in the articles.

If this question turned merely upon the words of the

(1) [1894] 2 Ch. 421. (2) [1900] 1 Ch. 492.
(3) (1885) 28 Ch. D. 416.

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agreement to settle the wife's after-acquired personal property, I should feel very great difficulty in saying that this 5000*l.* was not covered by the agreement. But, looking at the terms of the compromise of the probate action, I think the 5000*l.* must be regarded as proceeds of real estate of the wife, and as covered, not by the agreement to settle her personalty, but by the covenant to settle her realty, and that covenant binds only the husband. This point was not, as I understand, raised before Cozens-Hardy J. He decided the question merely upon the construction of the agreement relating to personalty. I think the true view is that the 5000*l.* was not included in the settlement at all.

This brings me to the second point, which is a much more difficult one, namely, whether the settlement has or has not become binding on the wife. She was an Irish lady, and was under twenty-one when she executed the marriage articles. They were executed in contemplation of her marriage with an Austrian gentleman, and it was contemplated that after their marriage they should (as they in fact did) live in Austria; in other words, that the wife should become domiciled in Austria, which was the domicil of the husband.

Now, according to English law, this settlement by her was a voidable contract in the sense explained by the House of Lords in *Edwards* v. *Carter*. (1) After the marriage she lived with her husband in Austria, and in 1867 she became of age. By the Austrian law she was unable to ratify or confirm this contract; she could always repudiate it, but could never ratify it, i.e., deprive herself of the right to repudiate it. This was the case in *Cooper* v. *Cooper* (2), but it was not so in *Edwards* v. *Carter*. (1) We have to consider what is the consequence of that. In the course of her married life she executed some documents which, if they are to be governed by English law, clearly amounted to a ratification of the settlement. By the Austrian law these documents were invalid in so far as they purported to be irrevocable ratifications.

The position is a simple one. This lady never had, either before or after her marriage, power to make an irrevocable

(1) [1893] A. C. 360. (2) 13 App. Cas. 88.

settlement. Can we in those circumstances hold that the settlement has become irrevocable? That is the paradox put to us. Cozens-Hardy J. has taken this view of it. He says, first, that, upon the authority of *Van Grutten* v. *Digby* (1) this was an English settlement to be governed by English law, and that by the English law as expounded by the House of Lords in *Edwards* v. *Carter* (2) (which affirmed a decision of this Court) a covenant in a marriage settlement by an infant or a settlement made on his marriage by an infant is voidable, and it is binding on him unless it is repudiated within a reasonable time after he attains twenty-one. It is said that this lady always had at all events power to repudiate the settlement—she could do that by Austrian law—and that, inasmuch as she did not repudiate it within a reasonable time after she attained twenty-one, the contract has become irrevocable. Is that reasoning sound? I think it is not, and for this reason. In the first place, as regards *Van Grutten* v. *Digby* (1), the point which we have now to consider did not arise for determination. There was no question there about incapacity to contract. There was a settlement made by persons of mature age and binding upon them when it was made. Romilly M.R. was clearly right in saying that that contract must be governed by the law of England, regardless of any change of the domicil of the parties afterwards. But in the present case the difficulty arises from the incapacity to contract, and that difficulty, as it seems to me, is not touched and still less governed by *Van Grutten* v. *Digby*. (1)

Now, what is the effect of the English law as expounded by the House of Lords in *Edwards* v. *Carter*? (2) What is the theory of it? The theory is, I apprehend, this—that there are some contracts of infants which by English law are absolutely void. There are a few (not a great many) contracts which in the view of English law cannot possibly be for the benefit of the infant—take a bond with penalties as an illustration—and they are void. An infant cannot so contract. The great bulk of infants' contracts are only voidable. What does that mean? It means that when the infant comes of age he can

(1) 31 Beav. 561. (2) [1893] A. C. 360.

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elect either to affirm or to disaffirm the contract. If he does nothing within a reasonable time after he attains twenty-one, the presumption is that he has affirmed the contract. The contract is binding and has been binding on him ever since he attained twenty-one, unless he proves the contrary by repudiating it within a reasonable time. But I think it would be an entire mistake to apply that part of English law which relates to repudiation within a reasonable time if you shut out the other part which relates to the ability to ratify.

Now, by the alteration of the wife's domicil in this case her ability to ratify her contract was lost. Ought we then to apply what I may call the mutilated English doctrine relating to infants, and to say that this contract has become irrevocable because it was not repudiated within a reasonable time? It seems to me that this would be contrary to good sense, and it would land us in the paradox which I have already mentioned, namely, that the contract had become irrevocable although the lady never had, either before or after she was married, the capacity to enter into an irrevocable contract.

As to the authorities, the nearest case to the present which has been cited, and the nearest which I know, is *Cooper* v. *Cooper* (1), in which a very similar difficulty had to be met by the House of Lords, but the question of reasonable time did not receive attention. In that case a lady did succeed in repudiating a marriage settlement made when she was an infant after the lapse of much more than a reasonable time, if you shut out of consideration the change of her domicil between the execution of the settlement and the repudiation. The question of reasonable time was not discussed there, but so far as it goes the case is in favour of the present appellants.

In my opinion, the effect of the change of domicil was that the English doctrine of reasonable time became inapplicable by reason of the impossibility after that change of the wife's effectually ratifying her contract. An alternative view of the case (perhaps it is only the same view in another shape) is that the effect of the change of domicil was to enlarge the reasonable time for repudiation. This may not perhaps be quite so satis-

(1) 13 App. Cas. 88.

factory a way of putting it; but I confess I do not see how it can be said that a reasonable time for repudiation had expired when there was no possibility of her doing anything else but repudiate. However, I think the former is the truer view, and any other view would be difficult to reconcile with *Cooper* v. *Cooper*. (1)

I may refer to the observations of Lord Watson in that case. He said (2): "Being of opinion that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of England, I agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shewn to have been for her benefit. She may ratify the contract, after attaining majority, and so become liable to implement it, but, in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation inter virum et uxorem." That, so far as it goes, although it does not quite touch the point, appears to me an authority in favour of the conclusion at which I have arrived.

I think, therefore, that the appeal must be allowed, and a declaration made in accordance with the plaintiffs' claim.

RIGBY L.J. I agree so completely with the Master of the Rolls that I am unable to add any independent reason for arriving at the same conclusion.

COLLINS L.J. I am of the same opinion.

When this lady married her contract was voidable by reason of her infancy.

While it was still voidable she became an Austrian subject, and all future dealings by her with the subject-matter of the settlement must be governed by Austrian law.

Unless the condition of English law, that such a contract can only be avoided within a reasonable time after attaining

(1) 13 App. Cas. 88. (2) 13 App. Cas. 106.

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majority, regulates her rights under the new domicil, she can repudiate at any time.

But is not this condition a mere incident of English law, which is inapplicable after she has changed her domicil? The matter does not stand on the same footing as if persons of full age had contracted that their contract should be voidable within a given time. That condition would be part of the contract itself, and would be binding on them in the new domicil. Here the condition is a mere incident of status, and has no application when the status is changed.

The above conclusion is based on the hypothesis that the rule that repudiation must be within a reasonable time is a mere arbitrary fetter on the right to avoid the contract.

But if the rule really rests, as I think it ought in reason to rest, on the implication that the voidable contract must after such a lapse of time be presumed to have been ratified, and to be therefore incapable of being avoided, the question is simplified, since when the wife is debarred by law from making an irrevocable election, she cannot be presumed to have made it.

Solicitors: *Kearsey, Hawes & Co.; Blount, Lynch & Petre.*

W. L. C.

In re GLADSTONE.
GLADSTONE *v.* GLADSTONE.

[1900 G. 591.]

C. A. 1900 May 2.

Settled Land — Tenant for Life — Power of Leasing — Lease of Surface reserving Minerals — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 13, 17.

Under the power to lease settled land conferred on a tenant for life by s. 6 of the Settled Land Act, 1882, a lease may be made of the surface of land reserving the mines and minerals beneath it.

Decision of Kekewich J. in *In re Newell and Nevill's Contract*, [1900] 1 Ch. 90, disapproved.

APPEAL against a decision of Cozens-Hardy J. in chambers.

An originating summons was issued by the trustees for the purposes of the Settled Land Acts of the will dated July 8, 1889, of W. H. Gladstone, deceased, the defendants being the tenant for life (an infant) of the Hawarden estate, which was settled by the will, and the remainderman.

By an order of North J., dated December 21, 1891, the trustees were empowered to exercise, on behalf of the infant during his minority, the powers of a tenant for life under the Settled Land Acts, 1882 to 1890.

The summons asked for the determination of the question whether the trustees had or had not power to grant to specified persons a building lease of certain portions of the settled estate, reserving the mines and minerals.

Cozens-Hardy J., following the decision of Kekewich J. in *In re Newell and Nevill's Contract* (1), and without expressing any opinion of his own, held that under the power of leasing given by the Settled Land Act, 1882, to a tenant for life there was no power to grant such a lease. Leave to appeal was given.

The plaintiffs appealed.

Warrington, Q.C., and *O. L. Clare*, for the plaintiffs. It

(1) [1900] 1 Ch. 90.

C. A. 1900 GLADSTONE, *In re.* GLADSTONE *v.* GLADSTONE.

is submitted that under s. 6 (1) of the Settled Land Act, 1882, there is power to grant the lease. Under s. 13 such a lease could in fact be granted by the machinery of a surrender, and s. 17 does not by implication cut down the power conferred by s. 6. The object of s. 17 was to give the largest possible powers in relation to a mining lease.

Cozens-Hardy J. simply followed the decision of Kekewich J. in *In re Newell and Nevill's Contract* (2), without expressing any opinion of his own. It is submitted that the view taken by Kekewich J. was erroneous. It was founded mainly on a dictum of Littledale J. in *Dayrell* v. *Hoare*. (3) But that dictum must be taken with reference to the particular case, in which the actual decision was only that a power of leasing given by will to a tenant for life did not authorize a lease of a part of the settled land with a grant of a sporting right over the remainder. The learned judge did not intend to lay down as a

(1) By s. 6, "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

"(i.) In case of a building lease, ninety-nine years;

"(ii.) In case of a mining lease, sixty years;

"(iii.) In case of any other lease, twenty-one years."

By s. 13, "(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

"(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

"(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots."

Sect. 17 (which is under the heading "Surface and minerals apart") provides: "(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land."

(2) [1900] 1 Ch. 90.

(3) (1840) 12 Ad. & E. 356, 369.

general rule that a part of land meant only a part divided vertically from the rest.

In the other case cited to Kekewich J., *Buckley* v. *Howell* (1), the question was as to the validity of a sale by a tenant for life of the surface without the minerals, and the ratio decidendi was that the proceeds of sale could be invested in the purchase of other land with minerals under it, and the tenant for life, being not impeachable for waste, would then be entitled to receive the profits of working both sets of minerals, and would thus gain an unfair advantage. This reasoning does not apply to a lease; and, moreover, the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108) (2), was passed for the purpose of getting rid for the future of the decision in *Buckley* v. *Howell*. (1)

In Sugden on Powers, 8th ed. cap. 18, Sect. II., pp. 727–736, there is no suggestion of such a restriction of a power to lease, though at p. 736 *Dayrell* v. *Hoare* (3) is referred to. And in Davidson's Conveyancing, 3rd ed. vol. iii. Part I., pp. 510–515, where the learned author treats of powers to grant building and mining leases, there is no reference to such a limitation of the power. And in vol. v., at p. 166, there is a precedent of a building lease made under a power in a settlement reserving the mines and minerals. It is clear that the opinion of conveyancers has been that in leases under an ordinary leasing power the surface may be demised without the mines and minerals.

Hon. A. Lyttelton, Q.C., and *Eustace Smith*, for the defendants.

LINDLEY M.R. The question turns entirely upon the true construction of s. 6 in conjunction with some other sections of the Settled Land Act, 1882. In the absence of any authority I should have thought that the meaning of those sections was reasonably clear. The governing section is s. 6, which confers on the tenant for life of settled land power to lease it, or any

(1) (1861) 29 Beav. 546.

(2) This Act was repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51; s. 44 of that Act (as amended by the Trustee Act, 1893, Amendment Act, 1894, 57 Vict. c. 10) being substituted for the Act of 1862.

(3) 12 Ad. & E. 356.

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part of it. In this case the plaintiffs, who are trustees of settled land for the purposes of the Act, have been authorized by the Court to exercise on behalf of the infant tenant for life during his minority the powers conferred by the Act on a tenant for life. The plaintiffs propose to grant a building lease of part of the land, reserving the mines and minerals under it, and the question is whether the Act authorizes the granting of such a lease. Cozens-Hardy J., following the decision of Kekewich J. in *In re Newell and Nevill's Contract* (1), and without expressing any opinion of his own, has held that such a lease is not authorized by the Act. I confess I cannot agree with the view taken by Kekewich J., and I think I can see the mistake into which the learned judge has fallen. The language of s. 6 is very wide and very strong. It says that "a tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same," for any term not exceeding the periods respectively mentioned in the cases of a building lease, a mining lease, and any other lease. Reading this section as a whole, it is obvious that its general language applies to building leases, as well as to mining leases and other leases. It enables the tenant for life to grant a lease of "the settled land or any part thereof." Looking at those words, I do not see how there is room for any doubt that the tenant for life is empowered to grant a lease of the surface of the land, reserving the mines and minerals under it, or to grant a lease of the mines and minerals without the surface. If the view taken by Kekewich J. is right, the tenant for life could not grant a lease of the mines without the surface. This would cut down the power in a manner which I think is not justified by the language, or by the general scope of the Act, the object of which was to enlarge the powers of a tenant for life. This is the conclusion at which I should have arrived independently of any authority and of any other sections of the Act. But s. 13, so far as it goes, confirms this view. Sect. 17 does no doubt look a little the other way. It is headed "Surface and minerals apart," and it provides that a sale or mining lease may be made "either of land, with or

(1) [1900] 1 Ch. 90.

without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals." The fact that the Legislature has said expressly in this section that a mining lease may be made with an exception of mines and minerals does suggest a doubt whether such an exception can be made in any other lease. But I do not think this doubt is sufficient to override the clear language of s. 6. Those words were, I think, inserted in s. 17 by way of extra precaution. It is not necessary to refer to any other section of the Act.

With regard to the authorities, apart from the decision of Kekewich J., I do not think they assist us in the present case. The Settled Land Act was intended to get rid of a number of old authorities, and to enable a tenant for life to do that which he could not have done before the Act. I do not think that any case decided before the Act can have any application to the present case.

The decision in *Dayrell* v. *Hoare* (1) was plainly right both under the old law and the new law, namely, that a power for a tenant for life to lease settled estates, "or any part or parts thereof," did not authorize a lease of part of the land, with liberty to sport over the rest. It is clear that a power to lease land cannot enable the donee of the power to impose a burden on the land. The language then used by Littledale J. was used with reference to the case before him, and does not apply to such a case as the present, and I think it was misunderstood by Kekewich J. As to *Buckley* v. *Howell* (2), in which Romilly M.R. held that a power of sale and exchange given by a will to trustees did not authorize them to sell land with a reservation of the minerals, there are two answers. The first is that the Legislature thought it desirable to get rid of the decision, and the Confirmation of Sales Act of 1862 was passed for that purpose. The second answer is that the decision applied to a sale, not to a lease. In my opinion there is ample power under s. 6 to grant the proposed lease.

RIGBY L.J. On the question of the construction of the Act I entirely agree with the Master of the Rolls, and I will not

(1) 12 Ad. & E. 356. (2) 29 Beav. 546.

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repeat what he has said. As to the authorities, I interpret the language of Littledale J. with reference to the case which was then before him, and I know of no authority for saying that he intended to decide what has been attributed to him. The decision in *Buckley* v. *Howell* (1) turned upon the provision for the reinvestment of the proceeds of land sold under the power. And it was held that the land must be sold entirely without any reservation of the minerals, because otherwise, if the purchase-money were invested in the purchase of other lands with minerals under them, the tenant for life, who was not impeachable for waste, would have the benefit of working both sets of minerals, and would thus get more out of the property than he would have done if the power had not been exercised.

I agree that s. 6 is quite sufficient to authorize the proposed lease, and I think that conveyancers have been quite right in not giving it the narrow construction which has been suggested.

I do not understand that Cozens-Hardy J. expressed any opinion of his own. He thought, and rightly, that he ought not to differ from the decision of Kekewich J., but to follow it, and to leave to this Court the responsibility of reversing it.

COLLINS L.J. I am of the same opinion.

Solicitors: *Farrar, Porter & Co., for Barker & Rogerson, Chester.*

(1) 29 Beav. 546.

W. L. C.

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[1870 R. 133.]

In re ROWLLS.
WALTERS *v.* SOLICITOR FOR THE TREASURY.

[1899 R. 1396.]

Tenant for Life and Remainderman—Trust for Conversion—Discretionary Power of Postponement—Annual Produce until Conversion to be deemed Annual Income of Converted Fund—Reversionary Interest—Omission to Convert—Non-exercise of Discretion by Trustees—Right of Tenant for Life—Rate of Interest.

When property is given by will on trusts for conversion and investment, and to hold the investments on trust for a tenant for life and remaindermen, with a discretionary power to the trustees to postpone the conversion, and a provision that the income until conversion is to go to the tenant for life, that provision extends to property (such as a reversionary interest) which is not producing income as well as to property of a wasting character.

Mackie v. *Mackie*, (1845) 5 Hare, 70, followed.

Decision of Stirling J. affirmed.

In adjusting the rights as between tenant for life and remaindermen in respect of a reversionary interest which ought to have been but was not converted by trustees :—

Held, that interest should be calculated at the rate of 3 per cent.

In re Goodenough, [1895] 2 Ch. 537, followed.

A testator bequeathed his personal estate to two trustees, upon trust for conversion and investment of the proceeds, and to pay the income of the investments to his sister during her life, and after her death to hold the capital on trusts for her children. But, if no child of the sister should attain a vested interest, the trust fund was to go to the two trustees beneficially, in equal moieties. The testator gave the trustees a discretionary power to postpone for such period as to them should seem expedient the conversion of any part of his personal estate, but the outstanding personal estate was to be subject to the trusts thereinbefore declared, and the yearly produce thereof was to be deemed annual income for the purpose of the trusts. At the time of the testator's death he had no property of a wasting character (except some leaseholds, as to which a special provision was made by his will), but he was entitled to a reversionary interest in a sum of Consols, subject to the life interest therein of his sister. When he died she was a spinster aged thirty-five.

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Ten years afterwards she was found a lunatic, and less than two years after that she died intestate. She had never married.

The trustees did not during her life sell the reversionary interest, and it fell in upon her death.

Held, by the Court of Appeal (upon evidence which was not before Stirling J.), that the trustees had never exercised their discretion as to the conversion of the reversionary interest, and that under the circumstances it ought to have been sold and the proceeds invested so as to produce income for the tenant for life:

Held, therefore, that the fund must be apportioned between the representative of the tenant for life and the remaindermen on the principle laid down in *In re Earl of Chesterfield's Trusts*, (1883) 24 Ch. D. 643, interest being calculated at the rate of 3 per cent. per annum.

APPEAL against an order of Stirling J., upon a petition presented in the above matters, that a sum of 5666*l.* 13*s.* 4*d.* New Consols, which was in Court in the action *Rowlls* v. *Bebb*, should be transferred in moieties to the petitioners, W. M. Walters and W. H. Rice respectively.

The action *Rowlls* v. *Bebb* was brought for the administration of the estate of Charles Rowlls, who died on April 26, 1868. The above-mentioned sum of Consols was appropriated in the action to provide for an annuity bequeathed by the testator to his daughter Alice Rowlls for her life, and subject to that life annuity the stock went under the will to her brother Alfred Rowlls.

Alfred Rowlls, by his will dated September 26, 1882, appointed W. M. Walters and W. H. Rice executors and trustees thereof, and, after bequeathing some legacies, he devised all the real estate to which he should be entitled at his decease, and bequeathed all the personal estate to which he should then be entitled, to W. M. Walters and W. H. Rice, upon trust to sell his real and leasehold estates as therein mentioned, and "to convert and get in my residuary personal estate and to invest the moneys to arise from such real and leasehold estates and residuary personal estate in their names in or upon some one or more of the investments or securities hereinafter mentioned." And the testator empowered his trustees to vary the investments with such consent and at such discretion as therein mentioned. "And upon further

trust to pay to or to permit and empower my sister Alice Rowlls Rowlls to receive the annual income of the said moneys, stocks, funds and securities during her life, for her sole and separate use and independent of any husband with whom she may intermarry, and her receipt alone shall be a sufficient discharge to my trustees, and my said sister shall not have power to alien or anticipate such income. And after the death of the said Alice Rowlls Rowlls I direct that my trustees shall stand possessed of the said moneys, stocks, funds, and securities, and the interest, dividends and income thereof thenceforth to accrue due" in trust for the child, if only one, or all the children, if more than one, of his sister A. R. Rowlls, who either before or after her decease should, being a son or sons, attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age, and if more than one equally, with the usual provisions for maintenance, accumulation, and advancement. But if no child of his sister A. R. Rowlls should (being a son) attain the age of twenty-one years, or (being a daughter) attain that age or marry under that age, the testator directed that his trustees should stand possessed of one equal moiety of the said "moneys, stocks, funds and securities, and of the dividends, interest and income thereof" in trust for W. M. Walters, his executors, administrators and assigns, and of the other equal moiety in trust for W. H. Rice, his executors, administrators and assigns. And the testator declared that "no sale of my real or leasehold estate shall be made in the lifetime of my said sister A. R. Rowlls without her previous consent in writing, and that my trustees shall have a discretionary power to postpone for such period as to them shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my decease consist of stocks, funds, shares and securities of any description whatever, but the unsold real estate and outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trust, and such real estate shall be transmissible as personal estate

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under and for the purposes of the ultimate trusts hereinbefore contained."

Alfred Rowlls died on September 1, 1887. Alice Rowlls was then of the age of thirty-five.

On December 23, 1897, she was found a lunatic by inquisition, and on April 19, 1899, she died, a spinster, and intestate. She had no next of kin, and administration to her estate was granted to the Solicitor to the Treasury.

The petition was presented by Walters and Rice in the action *Rowlls* v. *Bebb*, and it asked for the transfer of the Consols to the petitioners in equal moieties. At the suggestion of Stirling J. an originating summons was taken out by the petitioners against the Solicitor to the Treasury, to determine the question whether, upon the true construction of the will of Alfred Rowlls, any and, if any, what part of the 5666*l.* 13*s.* 4*d.* New Consols formed part of the estate of Alice Rowlls.

The order appealed from was made upon the petition and the summons, and it was made expressly "without prejudice to any claim of the legal personal representative of Alice Rowlls by reason of delay in conversion of the fund."

Stirling J. was of opinion upon the construction of the will that the discretionary power to postpone conversion applied to the reversionary interest in the 5666*l.* 13*s.* 4*d.* New Consols. In his opinion the decision in *Mackie* v. *Mackie* (1) in principle governed the case, and on the construction of the will the representative of the tenant for life was not entitled to any part of the fund, the reversion not having been sold. But his Lordship said that he decided simply the question of construction, and that, if any question arose as to whether there had been improper delay by the trustees in converting the reversion, that question was left open for determination in some other proceeding.

The Solicitor for the Treasury appealed.

The notice of appeal asked that the balance of the fund in Court might be paid or transferred to the appellant as administrator of Alice Rowlls, after deducting or raising throughout such a sum as, if put out at interest at 4 per cent. per annum on

(1) 5 Hare, 70.

September 1, 1887, the day of the death of Alfred Rowlls, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would with the accumulations of interest have produced on April 19, 1899, the day of the death of Alice Rowlls, a sum equivalent to the market value on that day of the 5666*l.* 13*s.* 4*d.* New Consols.

Sir R. E. Webster, *A.-G.*, and *Ingle Joyce*, for the appellant. The rule is that when a reversionary interest is comprised in property given by will in trust for sale, with power to postpone the sale, and for investment of the proceeds and payment of the income to a person for life, with remainder over as to the capital, the tenant for life has an equity to have that reversionary interest realized immediately and the proceeds invested, so as to have the benefit of the income during his life: *Johnson* v. *Routh* (1); *Countess of Harrington* v. *Atherton* (2); *Re Flower*. (3) The learned judge seems to have given undue importance to the power to postpone the sale of the testator's property; but that power does not alter the right of the tenant for life to have the reversionary interest treated as if sold and invested; it must be exercised for the benefit of the estate, so as not to prejudice the equities of successive takers: *Wilkinson* v. *Duncan*. (4) The mode of adjusting the equities as between the tenant for life and the remainderman in the case of a bequest of a reversionary interest is stated and explained in *In re Earl of Chesterfield's Trusts* (5) and *Beavan* v. *Beavan*. (6) The terms of this will shew that it was not intended to deprive the tenant for life of any equity to income arising from the proper realization of the testator's estate; and it is to be noticed that there is the absence of the usual proviso, which dates back certainly as far as 1864, the date of Davidson's Conveyancing, 2nd ed. vol. iv. p. 46, to the effect that a reversionary interest or other unproductive property shall not be treated as producing income—a clause which was commented on in *In re Hubbuck*. (7) Here the will says that, if

(1) (1857) 27 L. J. (Ch.) 305.
(2) (1864) 2 D. J. & S. 352.
(3) (1890) 62 L. T. 216.
(4) (1857) 23 Beav. 469.
(5) 24 Ch. D. 643, 648.
(6) (1869) 24 Ch. D. 649, n.
(7) [1896] 1 Ch. 754, 758.

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the trustees postpone conversion, they must nevertheless deal with the income according to the trusts. The judgment of Stirling J. is based on *In re Chancellor* (1) and *Mackie* v. *Mackie* (2), but he does not deal with *Wilkinson* v. *Duncan* (3), *In re Earl of Chesterfield's Trusts* (4), and *Beavan* v. *Beavan* (5), which lay down the true principle. *In re Chancellor* (1) has no application to a fund which is unproductive, and it is no authority for the proposition that the postponement of the realization of an unproductive asset in the discretion of the trustees is to deprive the tenant for life of the income which he would otherwise have derived from it. That case, and also *Mackie* v. *Mackie* (2) proceeded upon the express direction of the testator as to what was to be done with the income of his property during the period of postponement. Here there is nothing more than a statement that the income of unconverted property shall be deemed income for the purposes of the trusts. There is no direction that unproductive property shall be treated as property in which the several cestuis que trust are not to have their equitable rights. Again, the interests of the tenant for life cannot be prejudiced by the delay in conversion, for the trustees, being also remaindermen, were not entitled to exercise their discretionary power of postponement in their own favour and to the prejudice of the tenant for life. But it is clear from the evidence that they never exercised that discretionary power at all with regard to the reversionary interest, but simply overlooked it, without considering whether, according to the equitable principle laid down by the authorities, they ought to convert it or treat it as converted. Moreover, as the fund was safe in court, a sale was not to the interest of any one.

Butcher, Q.C., and *Hon. F. Russell*, for the trustees. It is not disputed that primâ facie a reversionary interest which is given by will on trust for a tenant for life and remaindermen ought to be converted. Nor is it denied that a discretionary power given to the trustees to postpone the conversion of the

(1) (1884) 26 Ch. D. 42.
(2) 5 Hare, 70.
(3) 23 Beav. 469.
(4) 24 Ch. D. 643, 648.
(5) 24 Ch. D. 649, n.

estate does not enable them to alter the rights inter se of the tenant for life and the remaindermen. But the case is entirely different when, as here, the will in effect provides that the tenant for life is to receive the income actually produced by the property during the period of postponement. In such a case the rule in *Howe* v. *Earl of Dartmouth* (1) does not apply; *In re Chancellor* (2); *In re Pitcairn.* (3) The discretionary power to postpone conversion and the provision as to the income during the postponement apply to a fund, such as a reversion, which is not producing income as well as to wasting property, such as leaseholds: *Mackie* v. *Mackie.* (4) The tenant for life must take the rough with the smooth. Stirling J. has followed that decision.

Upon the evidence the proper conclusion is that the trustees exercised their discretion properly. Their own interest was remote at the time of the testator's death. The tenant for life might have married, and at her age it was not unlikely that she would do so, and it would have been for the benefit of her children that the reversion should not be sold. Though the trustees had a beneficial interest, their action should be judged of just as if they had had no interest. If what they did might have been properly done in the exercise of their discretionary power, it should in the absence of proof of mala fides be assumed that it was so done: *Johnston* v. *Moore.* (5)

If the appeal is allowed, it is submitted that, in applying the rule laid down in *In re Earl of Chesterfield's Trusts* (6), the rate of interest ought to be 3 per cent., and not 4 per cent. as is asked by the notice of appeal: *In re Goodenough.* (7)

Ingle Joyce, in reply. The object of the power to postpone the conversion was to increase the income of the tenant for life; it does not apply to a case in which the postponement must diminish her income. *Mackie* v. *Mackie* (4) differed materially from the present case. In *Mackie* v. *Mackie* (4) there was not, as here, a trust to sell, with a power to postpone

(1) (1802) 7 Ves. 137; 6 R. R. 96.
(2) 26 Ch. D. 42.
(3) [1896] 2 Ch. 199.
(4) 5 Hare, 70.
(5) (1858) 27 L. J. (Ch.) 453.
(6) 24 Ch. D. 643.
(7) [1895] 2 Ch. 537.

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the sale of specific parts of the property, but there was a trust for sale of the whole with a direction that the time and mode of sale should be entirely left to the discretion of the trustees. And in that case the reversion was expectant on the decease of a lady of very advanced years.

LINDLEY M.R. A question of some difficulty arises on the construction of the testator's will, and also as to the effect of what has been done by the trustees under the will since his death. [His Lordship stated the provisions of the will as above set forth and the nature of the testator's property, and continued:—]

So that there is not only a discretionary power for the trustees to postpone, for such period as to them shall seem expedient, the conversion of his residuary personal estate, but also a direction the effect of which is that, if the conversion of any of the real or residuary personal estate should be postponed, then the rule in *Howe* v. *Earl of Dartmouth* (1) is to be excluded, and the income produced is to be treated as annual income and to go to the tenant for life.

Pausing there for a moment, and assuming that this discretionary power was properly exercised by the trustees, and that the conversion of the residuary personal estate was postponed in the exercise of that power, it appears to me that, on the authority of *Mackie* v. *Mackie* (2), the decision of Stirling J. is right. *Mackie* v. *Mackie* (2) decided a point which would otherwise have presented some difficulty—namely, that such a clause relating to the produce of unsold real estate and outstanding personal estate did apply to property which was not yielding income. That difficulty was solved in *Mackie* v. *Mackie* (2) by the decision of Wigram V.-C., and Stirling J. has taken the same view. The principle of the decision was this —that if you look at the will as a whole, the tenant for life is to take the income of the residuary personal estate for better or for worse, and *Howe* v. *Earl of Dartmouth* (1) does not apply against her or in her favour. In other words, if the property is yielding more income than she would be entitled to, if *Howe*

(1) 7 Ves. 137; 6 R. R. 96. (2) 5 Hare, 70.

v. *Earl of Dartmouth* (1) applied, she is to have it, and if less she is to go without it. Upon that authority I have come to the conclusion that on the true construction of this will the view of Stirling J. was correct.

But another and a totally different point has been raised before us, as to what has been done by the trustees since the testator's death. Stirling J. assumed that the discretionary power had been exercised by the trustees, and it has been agreed by the parties that we shall investigate that question upon the evidence which has been laid before us.

Now, although it is quite true that the trustees and executors were also residuary legatees, and that it was to their interest that this reversionary interest which formed a portion of the trust estate should not be converted, yet I am satisfied from the evidence that they never exercised the power to delay the conversion with a view to benefit themselves. I am satisfied that the question of converting, in accordance with the rule of *Howe* v. *Earl of Dartmouth* (1), a reversionary interest in property, to the income of which the tenant for life was herself entitled under another will, never crossed their minds, and it required the keen eyes of an equity lawyer to see that there was such a point. However, they did not see it, and they never thought of it. I do not mean that they did not think of the reversionary interest; they knew that it belonged to the testator, and that his sister was receiving the income of the fund for her life, but they never dreamt that she was also entitled to have the reversion of the fund, of the income of which she was already in the receipt, converted into money and the proceeds invested so as to increase her income. It would not occur to ninety-nine men out of a hundred. It was a mere oversight.

Before I go further, I will consider what is the scope of this discretionary power. What does it mean? It follows, I think, from what I have said about *Mackie* v. *Mackie* (2), that, if this power had been exercised and the reversionary interest had not been sold, it would have altered the relative positions of the tenant for life and the remaindermen. But it does not follow

(1) 7 Ves. 137; 6 R. R. 96. (2) 5 Hare, 70.

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that this discretionary power is anything more than a power in the nature of a power of management. I mean, there is nothing in the words which would give the trustees a right to say, apart from the management of the estate, "We will postpone selling the reversion in the interest of the children, at the expense of the tenant for life." I do not think that would be within the power. That would mean: "We will under our power of management, which if exercised might and would to a certain extent vary the rights inter se of the tenant for life and of the remaindermen, compel the tenant for life, whether she likes it or not, to go without the increase of income to which she would be entitled if the reversion were sold." I do not think that would be within the scope of it. Supposing the tenant for life had insisted upon the conversion of this reversionary interest, could the trustees have refused to convert it? I think not. The nature of the testator's property is important. There was no wasting property. I am not speaking of the leaseholds, because they were specially provided for by the will. But apart from them there was amongst the residuary personal estate no property yielding more income for the benefit of the tenant for life than she would be entitled to under *Howe* v. *Earl of Dartmouth*. (1) There was nothing, therefore, which as a matter of management would justify the trustees in saying, "There is some property which might be converted, the conversion of which would reduce the income of the tenant for life; there are some reversionary interests the conversion of which will increase her income, and as a matter of management we will not convert either." Had there been such circumstances they might have been justified in so doing. But here there was nothing to be gained by any one by preserving this reversionary interest unsold, except of course the benefit which would accrue to the remaindermen. But, as I have said, I am perfectly satisfied that these gentlemen were not intending to benefit themselves. They never thought about it.

If they never did think about this power, and if they could not, even if they had thought of it, have properly refused in this particular instance to convert the reversionary interest,

(1) 7 Ves. 137; 6 R. R. 96.

what follows? It follows that the representative of the tenant for life—that is, the Crown, she having died intestate and without any relatives—is entitled now to have the income which she lost during her lifetime made good out of the capital of the fund. I think there is no answer to that claim unless we take an entirely different view of the case.

It has been suggested that as this lady when her brother died was only thirty-five years of age, and there is evidence that she thought of marrying, and if she had married she might have had children, although the trustees did not in fact think about converting the reversionary estate interest, still, what they did was the right thing to do. I cannot come to that conclusion. It would involve the assumption that their discretionary power was much more than a power of management, which I do not think it was. And, moreover, I am not at all satisfied that, even if it was, the circumstances which existed would have justified them in exercising their discretion to the extent of saying that the reversionary interest should not be sold during the life of the tenant for life. If the power had been more extensive than I think it was it might have justified them in postponing the sale in order to see whether the tenant for life married or not, but it would not have justified them in making up their minds that it should not be sold whether she married or not. When this lady became a lunatic it was obviously wrong in any point of view to keep the reversionary interest unsold. She became a lunatic while she was still a spinster, and after that it was obviously wrong, however widely you construe the power, to keep the reversion unsold. But I adopt the narrower construction of the discretionary power. I do not think the discretion went so far as to enable them to alter the rights of the tenant for life, except that they might postpone the conversion of one portion of the estate rather than another as a matter of management.

Therefore, in the circumstances as they stand, and without imputing anything to the trustees but an oversight, I think the appellant is in the right, and the account must be rectified accordingly.

The only other question is, whether interest should be

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calculated at 3 per cent. or at 4 per cent. I have not looked at the Judgment Act, but I think I am right in saying that it provides that a judgment debt shall bear interest at 4 per cent. Of course, we cannot alter that. And I think the Rules provide that legacies shall bear interest at 4 per cent. But I know of no Rule which applies in terms to such a case as this, or even to the making good of breaches of trust. Having regard to the rate of interest which can now be obtained on securities upon which trustees may invest, it appears to me that in a case of this kind, even apart from the view taken by Kekewich J. in *In re Goodenough* (1), that 3 per cent., not 4, ought to be the rate of interest. With that exception I think the appeal must succeed.

RIGBY L.J. Two gentlemen, who are trustees of the testator's will and solicitors for his estate, and who in the events which have happened are the beneficial residuary legatees, claim to hold the residuary estate free from any right of the representative of the tenant for life in respect of the income which would have been produced for her from the sale of the reversionary interest in a sum of 5666*l.* Consols and the investment of the proceeds of sale.

I think these circumstances have some bearing upon the construction of what has been done by the trustees under the will. But I wish to make it plain that in my opinion these gentlemen were not swayed in their exercise of the power given to them by the will by any notions of self interest, and that in fact they have not, except technically, done any wrong throughout the whole administration of the estate.

The reversion in the 5666*l.* Consols was not realized during the life of the tenant for life. I repeat that I do not think anything intentionally wrong was done. But, if the question had been raised (I do not believe it was) and clearly brought to the attention of the trustees at the time when the tenant for life was found a lunatic, it would have been obviously their duty, from that time forward at any rate, to provide out of her estate an allowance for her maintenance upon the assumption that

(1) [1895] 2 Ch. 537.

the reversion had been sold. It would have been a grave malversation on their part if they had not made such an arrangement. The chances were enormous at that time that they would themselves gain pecuniarily by continuing to postpone the sale, or the consideration of the way in which the fund should ultimately be dealt with. And I do not hesitate to say that, if we had reason to suppose that they postponed the sale deliberately, we should regard their conduct very unfavourably. But I am satisfied by the evidence that the whole thing was absent from their minds, and that they never dreamt either then or before that they had any duty to sell the 5666*l.* reversion. It so happens that there were no wasting securities (leaseholds I leave out of consideration), there was no wasting property which could be affected by this power of postponement, and there was only this one reversion not producing income. Therefore, not only is it plain that the trustees never did exercise their discretionary power to postpone its conversion, but, in my judgment, it is equally plain that they never ought to have done so. To have done so would, in effect, have been a decision that they would take from the tenant for life the proportion of income to which she was entitled and present it to the remaindermen, i.e., either her children or themselves. I cannot see any justification for that. I do not mean to say that under the peculiar circumstances of this case they were bound actually to sell the reversion. The Court regards Consols as a perfectly safe investment. But I think they were bound not to exercise their power to postpone so as to produce an unequal effect as between the tenant for life and the remaindermen. The exercise of their discretion to postpone must necessarily in this case have had one result and one only, namely, to charge the tenant for life for the benefit of the remaindermen. Probably they thought that the remaindermen would be her children. But they must have known perfectly well that there was a very fair chance of their being themselves the remaindermen, and they ought not to have acted upon the hypothesis that the children were certain to be the remaindermen. But, even if it had been clear that the children would take vested interests, thus excluding the two trustees, I do not

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think the postponement of the conversion would have been justifiable. They had no power to take from the mother the income of the proceeds of sale and give it to the children. De facto, there never was a time when they professed to exercise, or thought that they would exercise, their power of postponement. De jure, it cannot be assumed that they did exercise that power in this unequal manner as between the tenant for life and the remaindermen.

In *Johnston* v. *Moore* (1) Wood V.-C. came to a conclusion which was inevitable upon the will then before him. A portion of the testator's outstanding personal estate consisted of his interest in a partnership business. The trustees in fact allowed that interest to remain outstanding. They must be taken to have known that they had, primâ facie, no power to do that. But the will contained a power to postpone the realization of the estate, and it was assumed, and I think necessarily assumed, that the trustees had done this in the exercise of their power to postpone, and the rights of the tenant for life and the remaindermen were adjusted upon that basis. But that case does not prove (and I do not think it is the law) that if it turns out, in a matter as to which the trustees were really ignorant, that what has been done might have been properly done under the power in the will, it must be deemed to have been so done. I think great injustice would often be done by such a presumption ; and, although I have already expressed my opinion that the postponement could not properly have been made at all, yet I do not think it ought to be assumed that that did take place which we know by the evidence did not in fact take place.

I will only add that, if I had to deal simply with the question of the construction of the will, I should hesitate long before coming to the conclusion that Stirling J. was wrong in treating *Mackie* v. *Mackie* (2) as covering the present case. But from my point of view it is not necessary to say anything about that, and I must not be understood as expressing any opinion about it. Upon the facts which have been brought before us, and which were not before Stirling J., I cannot hold that there was

(1) 27 L. J. (Ch.) 453. (2) 5 Hare, 70.

anything which would entitle the residuary legatees to say that they must be deemed to have exercised their power and to have exercised it equitably, and that therefore the representative of the tenant for life is not entitled to any part of the proceeds of the 5666*l.* Consols. But I wish to add that the trustees have acted very properly and fairly in bringing all the facts before us, whether in their own favour or not.

COLLINS L.J. I agree; and I can add nothing to the reasons given by the other members of the Court.

Solicitors: *Solicitor to the Treasury; Walters, Deverell & Co.*

W. L. C.

BARRON *v.* WILLIS.

[1898 B. 721.]

Solicitor and Client—Confidential Relation—Benefit conferred by Client on Solicitor or his Near Relation—Duty of Solicitor—Independent Advice.

The plaintiff claimed to have a deed of 1891 set aside by which she, in exercising with her husband (since deceased) a joint power of appointment, had conferred a benefit on the son of a solicitor who was acting for her husband in the transaction, but who had not been retained by her. The solicitor was also a trustee under a deed of 1890 by which the power had been created. He explained the effect of the deed of 1891 to the plaintiff, and also suggested that she should consult an independent solicitor; but he did not inform her that she was under no obligation to execute the deed, and that it was so adverse to her interest that she ought not to execute it without having independent advice, and she executed the deed without having that advice:—

Held (differing from Cozens-Hardy J., [1899] 2 Ch. 578, on a conclusion of fact), that a confidential relation existed between the plaintiff and the solicitor, and that therefore it was his duty not only to explain the deed to her, but also to take care that she did not execute it without having independent advice as to her position and her rights:

Held, therefore (reversing the decision of Cozens-Hardy J.), that the plaintiff was not bound by the deed of 1891, and that it must be set aside.

APPEAL against the decision of Cozens-Hardy J. (1)

By the action the plaintiff, the wife of William Barron,

(1) [1899] 2 Ch. 578.

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formerly the wife of Joseph Willis, sought to set aside a deed executed by her in 1891.

In October, 1889, the plaintiff was married to Joseph Willis. He was the only son of Thomas Willis, who died in April, 1890, having appointed his widow, Ann Willis, his executrix and sole residuary legatee.

On December 29, 1890, a deed was executed which was made between Ann Willis of the first part, Joseph Willis of the second part, the plaintiff (then his wife) of the third part, and the defendants Nicholas Willis, Issac Dunn, and William Moore Skinner of the fourth part. It contained a recital that the property of Thomas Willis consisted of the particulars mentioned in the first three schedules to the deed, and that the property mentioned in the fourth schedule belonged to Joseph Willis. There was a further recital that Ann Willis believed it to have been her late husband's intention to revoke, or partially revoke, his will and to dispose of his property in favour of his widow and son, and that, with a view to carrying out in some measure the wishes of the testator, and also, with the object of making provision for Joseph Willis and his wife and any future wife and the lawful issue of Joseph Willis, it had been agreed between Ann Willis and Joseph Willis by way of family arrangement that the properties mentioned in the schedules should be settled in the manner thereinafter expressed. The trusts were, during the joint lives of Ann Willis and Joseph Willis to pay him 100*l.* a year; subject thereto to pay the income to Ann Willis during her life, and subject thereto there was a protected life interest given to Joseph Willis, and after his death there was a trust for the widow of Joseph Willis during her life, with subsequent trusts in favour of the children or issue of Joseph Willis, and in default of issue a general power of appointment by deed was given to Joseph Willis and the plaintiff jointly, and subject thereto a general power of appointment by deed was given to the survivor, and subject thereto the property was settled in trust as to one half for Nicholas Willis, and as to the other half for Frederick Herbert Skinner, a son of the defendant William Moore Skinner, absolutely. Nicholas Willis was a cousin of Joseph Willis,

and Frederick Herbert Skinner was a great friend of Joseph Willis, and was then under twenty-one years of age. The reason for the peculiar form of the trusts for Joseph Willis was that he had fallen into intemperate habits.

In the year 1891 differences arose between Joseph Willis and his wife mainly, if not entirely, by reason of his intemperate habits. On October 3, 1891, a deed was executed by Joseph Willis, the plaintiff (his wife), and Ann Willis. This deed contained a recital that the deed of 1890 did not in all respects carry out the wishes of the parties to the family arrangement, and that it had been agreed that, for the purpose of varying the trusts of the same deed and of fully carrying out the intention of the parties, the deed now being stated should be executed, Ann Willis concurring therein to shew her assent to the same. The deed provided, first, that the provision made by the deed of 1890 for the widow of Joseph Willis during her life should be read and construed as a provision for her benefit so long only as she should remain the widow of Joseph Willis, and that the words "after the decease of the survivor" should be read and construed as "after the decease of the survivor or the marriage of the widow." By the same deed of 1891 Joseph Willis and the plaintiff, in exercise of the joint power of appointment reserved to them by the deed of 1890 in case of failure of issue, appointed that the trust funds should be held in trust for such person and in such manner as Joseph Willis alone should by deed appoint, and in default of appointment, and so far as no such appointment should extend, then (excluding the power of appointment by the widow of Joseph Willis) upon the trusts declared by the principal deed of 1890. Joseph Willis died intestate and without issue in September, 1893. By a deed dated August 2, 1894, and made between the plaintiff of the first part, Ann Willis of the second part, Frederick Herbert Skinner of the third part, and Nicholas Willis, Issac Dunn, and William Moore Skinner of the fourth part, after an accurate recital of the effect of the deeds of 1890 and 1891, and a further recital that it had been agreed by way of family arrangement that such further modification of the trusts as was thereinafter contained should be executed, it was witnessed

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and it was thereby agreed and declared, and particularly Ann Willis, Nicholas Willis, and Frederick Herbert Skinner thereby agreed, declared, and directed that the direction contained in the settlement for payment or application of the income of the trust funds to or for the benefit of the widow of Joseph Willis during her life should have full force and effect, and that that income should be paid to the plaintiff during her life in the same manner as if clause 1 of the modification deed of 1891 had not been inserted therein, and that in all other respects the deeds of 1890 and 1891 should be and were thereby confirmed.

All the three deeds of 1890, 1891, and 1894 were prepared by W. M. Skinner as solicitor, with the assistance of counsel. Ann Willis died in April, 1897. In November, 1897, the plaintiff married William Barron, and on February 22, 1898, this action was commenced, claiming a declaration that the deed of 1891 was not binding on the plaintiff so far as it purported to deprive her of the general power of appointment given to her by the deed of 1890; a declaration that the deed of 1894 was not binding on her so far as it confirmed the deed of 1891; and rectification of the same deeds so far as might be necessary. W. M. Skinner purchased the reversionary interest of his son in one moiety of the property.

The above-mentioned facts were stated by Cozens-Hardy J. in his judgment to be undisputed. And he said that upon the evidence he had arrived at the following conclusions: (1.) he thought that Joseph Willis and his mother, Ann Willis, were both desirous that the property which came from them should not go to "a strange man," meaning a second husband of the plaintiff, or to any member of her family, and that this desire was made known to the plaintiff. She did not deem this desire unreasonable or improper, and she consented to give effect to it. Joseph Willis and his mother thought that the deed of 1890 did not, in respect to those matters, give effect to their real intentions, though those intentions had not been communicated to W. M. Skinner. He was angry at the suggestion that there was any mistake on his part, and unwilling that the deed should be modified. (2.) His Lordship

thought the deed of 1891 was in substance a transaction between the plaintiff and her husband. (3.) He thought the nature and effect of the deed of 1891 were explained to the plaintiff on September 30, 1891, and again on October 3, when it was executed by her and her husband, and that on that occasion W. M. Skinner suggested that both of them should go to some other solicitor. (4.) His Lordship thought the deed of 1894 was most carefully explained to the plaintiff before its execution, and he believed that she understood its effect, although she had now brought herself to believe that it was never explained to her and that she never understood it. (5.) His Lordship thought that W. M. Skinner did act as the plaintiff's solicitor in the matter of the 1894 deed, which was not complained of, but that he did not act for her in the matter of the 1891 deed. Whether at that time the relation of solicitor and client existed between the plaintiff and Skinner was a matter of more doubt, but on the whole he was not satisfied that Skinner did act as her solicitor until long after the execution of the deed of 1891. (6.) His Lordship thought that no case had been made for setting aside or rectifying the deed of 1891, unless it could be impeached on the ground of some fiduciary relation. He held that the plaintiff's claim had failed, and he dismissed the action.

The plaintiff appealed.

Hughes, *Q.C.*, and *Ashton Cross*, for the plaintiff, repeated the arguments used by them in the Court below, and, in addition to the cases there cited by them, referred to *Lyon* v. *Home* (1), *Nedby* v. *Nedby* (2), *Proctor* v. *Robinson* (3), *Moxon* v. *Payne* (4), *Kempson* v. *Ashbee* (5), and *Allcard* v. *Skinner*. (6)

Astbury, *Q.C.*, and *P. F. S. Stokes*, for the defendant Willis, argued, with regard to the contention that W. M. Skinner not only acted as the plaintiff's solicitor with reference to the deed of 1891, but was also a trustee of the deed of 1890, that there was no rule established by the authorities that, so long as the

(1) (1868) L. R. 6 Eq. 655.
(2) (1852) 5 De G. & Sm. 377.
(3) (1866) 35 Beav. 329; 15 L. T. 431.
(4) (1873) L. R. 8 Ch. 881, 885.
(5) (1874) L. R. 10 Ch. 15, 20.
(6) (1887) 36 Ch. D. 145.

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relation of trustee and cestui que trust existed, a cestui que trust could not, by the exercise of a power or by executing a deed without communication with his trustee, make a good gift to the trustee.

[They referred to *Liles* v. *Terry* (1), *Rhodes* v. *Bate* (2), and *Goddard* v. *Carlisle*. (3)]

Eve, *Q.C.*, and *Austen-Cartmell*, for the defendants W. M. Skinner and F. H. Skinner, contended that the deed of 1891 could not now be set aside, as it was impossible to restore the parties to their original position. The defendant W. M. Skinner fully explained the deeds to the plaintiff, and suggested that an independent solicitor should be employed, and it was not his duty to do more. He was not acting as the legal adviser of any of the parties in the transaction. He was called in only for the purpose of carrying out a bargain which had previously been made between them, and his function was only to put their bargain into legal form. He was not in the position of a solicitor in the transaction, or in that of a trustee bargaining with his cestui que trust. The bargain was complete before his ministerial duty commenced. Skinner was acting as the husband's solicitor in the transaction, and he took even superfluous care that the wife should understand the nature of the bargain into which she was entering. It does not follow that, because the transaction resulted in a benefit to Skinner's family, it amounted to a gift as between the plaintiff and them. It must be shewn that there was an intention on her part to confer a benefit on them. In *Liles* v. *Terry* (1) the client had formed the intention of making a gift to the solicitor, and therefore it was held that the transaction could not stand, unless it was shewn that the client had independent advice. In the present case the plaintiff had no intention of benefiting Skinner's family; the whole object and intention of the transaction was to get rid of the plaintiff's general power of appointment.

Hughes, *Q.C.*, in reply. The admitted facts are enough to

(1) [1895] 2 Q. B. 679, 680, 683, 686. (2) (1865) L. R. 1 Ch. 252.
(3) (1821) 9 Price, 169; 23 R. R. 654.

shew that the relation of solicitor and client existed between Skinner and the plaintiff. It is not a question of retainer, but of the plaintiff's state of mind. She had previously consulted Skinner in legal matters, and she trusted to him on this occasion to advise her. He stood in a confidential relation to her. If such a relation once existed, its continuance will be presumed, unless there is distinct evidence of its determination: *Rhodes* v. *Bate*. (1) The relation of trustee and cestui que trust also existed. If the confidential relation exists and a benefit is conferred by the one on the other, the exercise of undue influence is a presumption of law which cannot be rebutted. The rule is independent of any actual exercise of influence, and it extends to a case in which the person who takes the benefit did not even know that it was being conferred upon him. It is immaterial that there was no animus donandi. Indeed, if there was not, it would shew that the plaintiff did not understand what she was doing. In order that such a transaction may stand, it is not enough to shew that the effect of what the plaintiff was doing was explained to her by the solicitor; it must be shewn that she had independent advice as to her position and rights: *Huguenin* v. *Baseley* (2); *Bridgman* v. *Green*. (3) It was never pointed out to the plaintiff that she was under no obligation to alter the settlement of 1890. The fact that the benefit being conferred on Skinner was not obvious made it the more necessary that the matter should be fully explained to the plaintiff. It cannot be suggested that she was ever advised that she had any ground to complain of the deed of 1891. She was not informed of her rights, and therefore the confirmation by the deed of 1894 cannot bind her: *Moxon* v. *Payne*. (4) In order to constitute the relation of solicitor and client, it is sufficient that the party has no other solicitor to whom he is in the habit of resorting for advice: *Goddard* v. *Carlisle*. (5) There had been no undue delay in the bringing of the action. No one's position has been altered for the worse. The confidential relation continued until November, 1897, and the action was commenced in February, 1898.

(1) L. R. 1 Ch. 252.
(2) (1807) 14 Ves. 273; 9 R. R. 276.
(3) (1755) 2 Ves. Sen. 627.
(4) L. R. 8 Ch. 881.
(5) 9 Price, 169; 23 R. R. 654.

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LINDLEY M.R. This is an important and somewhat difficult case, because it is very near the line, and although the principles applicable to it are well settled their application to this particular case is unquestionably difficult. The difficulty turns upon the question whether it was the duty of Mr. W. M. Skinner to take care that the plaintiff had independent advice in the transactions which are impeached. That depends mainly upon this—whether he stood in such a confidential relation to her as rendered it his duty to take such care. I make no reflections upon Mr. Skinner beyond this—that he certainly did not consider it his duty to see that the plaintiff had independent advice. If he failed in that respect, then the observations made by Turner L.J. in *Rhodes* v. *Bate* (1) would apply to him, although he may have acted with perfect honesty. If he did in fact disregard his duty, the consequence must follow that the transaction which is impeached cannot stand. It appears to me that when once the facts of the case are grasped it is impossible to deny the existence of a confidential relation between Mr. Skinner and the plaintiff in 1891 and 1894. Let us consider his position in 1891, when the first supplemental deed was executed. [His Lordship stated the effect of the deed of 1890, and continued :—]

So that his position was this—he and the defendants Nicholas Willis and Dunn were trustees as well as for the plaintiff as for the other persons who took interests under that deed : they had a discretion as to the application of Mr. Joseph Willis' income during his life, and the ultimate reversion of the beneficial interest in the settled property was given as to half to Nicholas Willis, and as to the other half to W. M. Skinner's son. That was a position of difficulty and delicacy for William Moore Skinner, who was the friend—and unquestionably a very intimate friend—of the Willis family, and their legal adviser. He was trusted by them all, and he was in a position of delicacy, because he was not only a trustee under the deed, but his son took a beneficial interest under it.

That was his position under that deed alone. In consequence of the intemperate habits of Joseph Willis unhappy differences arose between him and his wife, and before the

(1) L. R. 1 Ch. 252.

deed of 1891 was executed she, now the plaintiff, consulted W. M. Skinner as solicitor—that is, she went to him for advice. It was quite natural that she should do this, and I allude to it for the purpose of emphasizing the fact that in October, 1891, when the first supplemental deed was executed, she had been consulting W. M. Skinner about her position with reference to her settled property, and about her husband, and a possible separation. There was some allusion in the deed of 1890 to a possible separation, which looks as if it was considered even at that time quite possible that owing to her husband's drunken habits the difficulties might arise which unfortunately did afterwards arise. That was her position in 1891. In the late summer of 1891 there seems to have been some unpleasantness between herself and her husband, and there was a family dispute. Mrs. Willis (the mother) and her son Joseph Willis appear to have desired to have the deed of 1890 altered; they naturally went to W. M. Skinner about it. The wife was told that there was a mistake in the deed, and that her husband and his mother desired to have it rectified. I do not attach much importance to the word "rectified," but they desired to have some alterations made, and I am satisfied, after reading the examination and cross-examination of the plaintiff, that she knew a great deal more than she was at first prepared to admit. She knew, I think, that it was intended to cut down her life interest to an interest for her widowhood only, and she certainly knew that her power of disposition was to be materially altered. The evidence, I think, shews that she did not know the exact method of doing this, but she certainly knew and understood that her husband was to have some power of disposition which he had not got before. It is not certain whether she also realized that she was to have no power of disposition; Mr. Skinner says she understood that. Perhaps she did.

What, then, was done? W. M. Skinner was instructed to carry out the proposed alterations. He did not like it, because it was said by the mother and her son that there had been a blunder of his own—that he had failed to carry out their previous instructions. They talked about rectifying a mistake,

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but he did not admit that there had been any mistake. However, it was left to him to prepare a deed to carry into effect their wishes. There were various modes of doing this, and he laid instructions before counsel to prepare the deed. Counsel did prepare a draft deed, but, in consequence of the obscurity of his instructions, he suggested two modes of doing what was desired; one of which was much less beneficial to the plaintiff than the other, and that one which was the less beneficial to the plaintiff was also the most beneficial to the reversioners.

Then the question arises, What was Mr. W. M. Skinner's duty to Mrs. Joseph Willis with reference to this matter? She says that she trusted him—she looked upon him as her confidential adviser and her solicitor. She did not employ him as such. He was employed by the other members of the family, but she looked to him to carry out the matter in a proper way, and to give her such assistance as occasion might require. He did that to a certain extent. He suggested that she should consult some other solicitor, but he did not point out to her her real position. He says that he explained the deed to her. I will assume that he did this to the full extent which he asserts, but unquestionably he never gave her any advice shewing her that the proposed alteration in the deed could not be made without either a lawsuit or her consent. He never explained it to her that the alteration was so adverse to her interests that it would be unadvisable for her to execute the new deed or to concur in it without further consideration. He did not consider that it was his duty to do that; he thought his duty was only to explain the deed to her. In that, I think, he adopted too low a standard of his duty in the position in which he was placed, and considering the extent to which he knew he was trusted by all parties in the preparation of the deed.

We have been invited to take the view which was adopted by Cozens-Hardy J., that Mr. W. M. Skinner stood in an indifferent position, that he was a solicitor merely carrying out a bargain already made between the parties, and that it was no business of his to consider that bargain or the interests of those who had made it. Considering his relation to the plaintiff, it is, I

think, impossible to accept that view of his position, and that is the key to the whole of the case. I cannot think that he performed his duty to the plaintiff in merely explaining to her the effect of the deed without pointing out to her the various modes by which the desire of the parties could be carried out, and the extreme importance to her of one of the methods rather than the others. Even if it was not necessary that she should have independent advice, it was necessary that she should have a fuller explanation than she had, and if she was entitled to receive that fuller explanation she did not have it. She did not have it, not because Mr. W. M. Skinner was scheming for a personal advantage for himself or his son—I exonerate him from anything of that kind—but it was because he did not rise to the occasion, he did not see the delicacy of his position, and he did not, therefore, advise the lady to obtain independent advice, so that she might realize what she was doing. I cannot bring myself to think that if, shortly after the deed of 1891 had been executed, Mrs. Joseph Willis had obtained independent advice, and had sought to have it set aside, she would have failed. I am convinced that she would have succeeded.

If this be so, the rest of the case is comparatively easy. It is not necessary to refer to the authorities to shew that up to that point the doctrine laid down by Lord Eldon in *Huguenin* v. *Baseley* (1) would carry the plaintiff all the way. *Rhodes* v. *Bate* (2) and *Liles* v. *Terry* (3) are illustrations of the principle laid down in *Huguenin* v. *Baseley*. (1) The principle is most important, and I cannot adopt the view which is attributed to my learned predecessor, Lord Esher M.R., in *Liles* v. *Terry* (4), that it is "unfortunate that such a rule should have been laid down, because in particular instances it may work great injustice; and I do not think that a hard and fast rule which may work such injustice ought to be the rule of law in the matter." On the contrary, I think the rule is based upon a knowledge of human nature, and it was laid down in order to prevent the very mischief which arises in a case like the present which is on the line, and in which people may have

(1) 14 Ves. 273; 9 R. R. 276.
(2) L. R. 1 Ch. 252.
(3) [1895] 2 Q. B. 679.
(4) Ibid. 683.

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acted fairly but without proper advice. I accept what Mr. W. M. Skinner says when it differs from what the plaintiff says. He says she was told in 1894 that she was in a position to attack the deed of 1891. She says nothing of that kind was brought to her attention, but on the contrary it was supposed that she could not attack that deed. The deed of 1894 was rather in her favour, and Mr. W. M. Skinner is entitled to the merit of having obtained for her a larger measure of justice than perhaps she would have obtained without his assistance. The deed did restore to her a life interest, but he inserted a clause at the end confirming the deed of 1891 without her having any further independent advice or any further explanation of what she was about to do. I do not believe for a moment that she understood the effect of it; she did not understand it at all. She understood what she was told—she understood that it was a confirmatory deed; but that does not help us to see whether she understood her rights and her position. Upon the principles which were illustrated in *Moxon* v. *Payne* (1), such limited understanding cannot assist the defendants. Nor can I adopt the view that by releasing the power of appointment which was reserved to her by the deed of 1890 she was giving up a mere trifling benefit, so as to entitle the defendants to the advantage of what Turner L.J. said in *Rhodes* v. *Bate* (2) that "a mere trifling gift to a person standing in a confidential relation" cannot be reasonably said "to stand in the same position as a gift of a man's whole property." I follow Mr. Astbury's observation that, if you took the reversion into the market and were to calculate her chance of selling it, probably no one would have given her anything for it; but it does not follow that the power of appointment which was given to her by the deed of 1890 was not of the greatest possible value to her. It might be or might not. That depended on whether her husband exercised his power of appointment. I do not know whether he would or would not have exercised it; but, in the events which have happened, I see the enormous importance of her not being deprived of that power of which she was deprived without knowing what she was about.

(1) L. R. 8 Ch. 881. (2) L. R. 1 Ch. 258.

The only other point is the position of the defendant, Nicholas Willis. Mr. Astbury, who has argued the case with his usual skill, says that Mr. Nicholas Willis does not claim under the deed of 1891, but under the deed of 1890. That is true, he claims the reversion. But, if he claims the benefit of the deed of 1891, he claims the extinction of the plaintiff's power of appointment. So far as he relies upon that, he relies upon those who obtained it, and he must take it with its defects. That a volunteer has no equity against setting aside a deed of this kind is well settled. This was laid down in *Huguenin* v. *Baseley* (1), and the point was considered by Fry J. in *Bainbrigge* v. *Browne*. (2)

On the whole, I think the learned judge has not attributed sufficient importance to the confidential relation which certainly existed between the plaintiff and Mr. W. M. Skinner in 1891, and has attached too much weight to her admission that she did not employ Mr. Skinner as her solicitor, which I fully admit. But I cannot agree with him that it was not the duty of Mr. Skinner to do more than he did. In my opinion the appeal must be allowed, and a declaration must be made in accordance with the first two paragraphs of the prayer of the claim.

RIGBY L.J. In my opinion the real question in this case is, was there a confidential relation between W. M. Skinner and the plaintiff at the time of the execution of the deeds of 1891 and 1894, and had the plaintiff independent advice? Certainly she had not independent advice, and I do not think that any advice from Mr. Skinner could avail him in the way of defence. Once or twice he suggested that her husband and herself, and afterwards her mother-in-law and herself, should go to an independent solicitor. For what purpose? There was never a hint that they should obtain advice as to their rights, but only an explanation of the contents of the deed; they were to consult the solicitor as a dictionary. Having absolute confidence in Mr. Skinner, they did not think fit to do so; and that was the only advice which Mrs. Joseph Willis had throughout the whole affair.

(1) 14 Ves. 273; 9 R. R. 276. (2) (1881) 18 Ch. D. 188.

C. A. 1900 BARRON v. WILLIS. Rigby L.J.

The more difficult question perhaps is as to the nature of the relation between the plaintiff and Mr. Skinner. But, even if he thought he was not acting as her solicitor, the important matter is whether she was placing confidence in him as her solicitor. She had employed him de facto as her solicitor in reference to the trouble which had arisen between her husband and herself, and even in the matter of the settlement he undertook on September 30, 1891, to act towards her in a manner which I think is conclusive that he was really acting as her solicitor. No doubt in his own mind he drew the distinction that he was giving her information, not advice. In my opinion a man cannot split his duty in that way. What ought he to have done when the deed of 1891 was first spoken of? He ought to have said to the plaintiff (I do not suggest that he would not have done so if he had rightly appreciated his position), "This is a matter in which your interests are very closely and in a very important degree concerned. I am acting for your husband, and it is not right that I should act for you. Therefore, before I take a step in the matter, I insist upon your consulting an independent solicitor." Such an independent solicitor would not, I think, have had any doubt as to the advice which he should give her. He would have said, "You have an important right under the deed of 1890 which should not lightly be given up. You have a joint power of appointment with your husband, and you have in the event of your being the survivor power to appoint the whole of the fund." She might then have said, "I do not care for that; I shall do as I please. My wish is to give up those powers." If that had happened it might have been quite right that her powers should be given up. But it could not be right that the husband's solicitor should act in the matter as if she had no rights of her own, and without telling her what she was doing. However fully he might have explained the deeds to her, if he did not bring home to her mind that she had rights which could not be taken away from her without her consent, the explanation was of no value. On the evidence I think it is idle to suppose that the deed of 1890 could have been rectified.

It has been suggested, and the learned judge seems to a

great extent to have accepted the suggestion, that the deed of 1891 was the result of a bargain between the plaintiff and her husband. I never saw a more hopeless contention. In my opinion there is no evidence of any such bargain. I will assume that the plaintiff knew what she was doing, and that she executed the deeds with the full knowledge of their contents. But the rule of law is that a person who enters into a transaction which results in benefiting the solicitor employed in it, or a member of his family, cannot be bound by it unless he has had independent advice in the matter. As to the confirmation by the deed of 1894, there could not be confirmation so long as the confidential relation continued which is proved to have existed at the time of the transaction of 1891. So long as that relation existed, any confirmation would only prove the absolute influence which the solicitor had over the plaintiff. After her first husband's death she escaped from that influence, and then only a few months intervened before this action was brought. The question is when did she obtain information as to her position, and it was not until she had consulted an independent solicitor that she obtained it.

COLLINS L.J. I am of the same opinion; but, as we are differing from the learned judge below, I will add a few words.

I take the crucial point in the case to be this: Was there or was there not such a relation between the plaintiff and Mr. W. M. Skinner as to place on him the obligation, not only to explain the deed to her, but to advise her as to her rights?

If such a relation existed between them, he does not pretend that he ever advised her. His case is that he had no duty beyond explaining the deed to her, and that he did explain it. Did, then, the relation which I have mentioned exist between them? It is common ground that the plaintiff had within a short time before the deed of 1891 was contemplated consulted Mr. Skinner upon a matter of extreme delicacy—the relations between herself and her husband, with a view to a possible separation. To use the words of Lord Eldon in *Huguenin* v. *Baseley* (1), this was "demonstration to Mr. Skinner that she

(1) 14 Ves. 294.

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placed confidence in him as high as one individual ever placed in another." That was the relation subsisting between them at the time when she came to him for that advice. That relation must be presumed, on the authority of *Rhodes* v. *Bate* (1), to have continued up to the time when the deed of 1891 was in contemplation. And, indeed, it appears to me that Mr. Skinner was specially consulted by her with reference to that deed. He had been the family solicitor, and not only so, but he had been in this exceedingly confidential relation with her, and his own case is that he communicated with her about this deed, and did in a sense advise her—that is, in a sense in which he thought his obligation was limited to explaining to her the effect of the deed. The situation is further complicated by the fact that by this arrangement, in which he assumed the rôle of a neutral expert explaining the matter, he obtained for his son a possible benefit. How did that affect the relation? It introduced this difficulty—that he being the person bound by virtue of his relation to her to advise the plaintiff, he incapacitated himself from doing it. He was no longer in a position to give her that advice which she was entitled to have, and, moreover, he debarred himself from accepting a benefit from her without shewing (and the onus was on him to shew) that she had independent advice. He does not suggest that she ever had independent advice, or that he took any step to procure it for her. He did suggest that she should get some one else to explain to her the meaning of the deed. His obligation was not satisfied in that way by merely measuring what she was giving away and what she was retaining. That which ought to have been clearly brought before her—that she had a right to keep what she was about to give up—was never brought before her at all.

Under these circumstances this deed of 1891 was executed, and by its execution an advantage—slight it may be but real—was secured for the younger Skinner. A barrier which might have been insuperable while the old arrangement existed, namely, her joint power of appointment during her husband's lifetime and her absolute power of appointment if she survived

(1) L. R. 1 Ch. 252.

him, was removed out of the way of the possible succession of the younger Skinner to the reversion under the deed of 1890. In this way an advantage was secured to the son of Mr. Skinner, the solicitor who, as I have already said, was placed in a position which made it obligatory upon him to give the plaintiff full and impartial advice as to all the circumstances attending the execution of the deed. He had incapacitated himself from giving that advice, and he obtained for his son a benefit which he was incapable of accepting unless the plaintiff had that independent advice. Accepting, as I do, all the conclusions of the learned judge below on the questions of fact, it seems to me that on the admitted facts up to this point the plaintiff has an unanswerable claim.

But it is said that by the deed of 1894 she confirmed the voidable settlement of 1891. When, however, you look at the facts, it is obvious that that deed cannot operate as a confirmation. Confirmation, when she did not know her rights? When she accepted a situation which in her judgment she had no power to control, and because it was all that Frederick Skinner and Nicholas Willis could be compelled to give her? Is that confirmation? There could be no confirmation unless she knew her rights and had independent advice upon them. The same observation applies in answer to the suggestion that she slept upon her rights. She did not know what her rights were, and she never had independent advice about them until after she married her present husband.

Solicitors: *Wynne-Baxter & Keeble, for Beldon & Ackroyd, Bradford; Patersons, Snow & Co., for Ranson, Nelson & Maling, Sunderland; Sismey & Sismey, for Skinner, Son & Church, Sunderland.*

W. L. C.

STIRLING J.

1900

Feb. 20, 21, 22; *March* 29.

SMITH *v.* BAXTER.

[1899 S. 1921.]

Light—Obstruction—Injunction—Declaration—Rebuilding—Evidence of Intention to Preserve Ancient Lights—User—Interruption—Abandonment—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

In an action to restrain the obstruction of ancient lights in respect of premises which have been rebuilt, evidence of the plaintiff's intention to preserve ancient lights upon the rebuilding is unnecessary.

"Interruption" in s. 3 of the Prescription Act bears the same meaning as in s. 4, and refers to an adverse obstruction, and not to a mere discontinuance of user.

The question whether there has been an actual enjoyment of the use of light under the Prescription Act for the statutory period is a question of fact to be determined according to the circumstances of each case.

The plaintiffs, who had rebuilt their premises, claimed a right to ancient lights in respect of portions of three windows in the new building which coincided with portions of three windows in the old building. A great part of the coincident area had been, in the case of two of the windows, boarded up, and, in the case of the third window, covered with shelving, for more than a year before action brought; but the shelving allowed a substantial amount of light to pass through into the building:—

Held, that, as to the two first windows, there had been such a discontinuance of user as to prevent the acquisition of any right by the plaintiffs; secus as to the third.

In the circumstances of the case the Court made a declaration of the plaintiffs' right in lieu of granting an injunction, the defendant undertaking to submit the plans of his proposed building to the plaintiffs.

THIS was an action for an injunction to restrain the defendant from obstructing the access of light to certain alleged ancient lights in a large building, Nos. 28, 29, 30, 31, and 32, Hutton Street, Whitefriars.

The plaintiffs, who were a firm of publishers and printers, were underlessees of the building in question for a term of twenty-one years from September 29, 1892, under a lease dated September 5, 1892. On the site of this building formerly stood five small houses, Nos. 28–32, Hutton Street, which were in existence more than twenty years before the commencement of this action, and which were pulled down in 1891. The plaintiffs

claimed the access of light in respect of certain parts of a skylight which lighted the ground-floor and of three windows on the first-floor, all at the back of the existing building. These portions of the skylight and windows corresponded to skylights and windows in the old houses, Nos. 28, 29, and 30. The existing skylight was situate in a plane which was parallel to that of the old skylights, but was 1 ft. 6 in. higher than they were. The first-floor back wall of the plaintiffs' premises was set back from the common boundary of the plaintiffs' and defendant's premises to a distance of 4 ft. 6 in.; while the back wall of the old houses was set back from the same boundary 4 feet only.

With regard to the old skylights, it was proved that useful light reached the ground-floor of the old houses through them; it was further proved that a substantial quantity of useful light which would have passed through these old skylights now reached the ground-floor of the existing building through the existing skylight, the area of which was larger than the combined areas of the three old skylights.

With regard to the old windows on the first-floor, no one of them had been preserved in its entirety in any existing window of the plaintiffs' premises; but substantial portions of all three coincided with portions of windows, numbered 1, 4, and 7 on a plan put in evidence by the defendant, and it was proved (subject to a question as to the effect of a partial blocking up of the windows by the plaintiffs, as hereinafter stated) that a substantial quantity of useful light which would have passed through these last-mentioned portions of the old windows if they still existed now reached the first-floor of the plaintiffs' building through the corresponding portions of the existing windows.

The total area of the old first-floor windows was 95 square feet, and of this area 22 square feet had been preserved in the windows of the new building.

With regard to the user of the windows on the first-floor, it was admitted by one of the plaintiffs that in the windows Nos. 1 and 7 considerable portions of the old area—in one case about one-half and in the other about two-thirds—had been

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boarded up for more than twelve months before action brought, the reason being that opposite to these windows were placed printing machines, at which the printers worked with their backs to the light, and it was found that accidents repeatedly occurred by which these portions of the windows were broken. With regard to window No. 4, it was also admitted by the same witness that a considerable portion—about one-half—of the old area had for more than a year been covered by open shelving used for drying printing work. The shelves were from three inches to a foot apart, and projected about two feet and caused a material interference with the light, though a substantial quantity of light still passed into the plaintiffs' building. The boarding and shelving had been removed before the trial of the action.

The circumstances which led to the bringing of the action were as follows: In November, 1898, the defendant's solicitors opened a correspondence with the plaintiffs with a view to ascertain whether the plaintiffs claimed any right to ancient lights in respect of their premises. In the course of the correspondence they stated that the defendant, who was the owner of a low building at the back of the plaintiffs' premises, contemplated increasing the height of his building in a way which would interfere with the plaintiffs' lights as they then existed, and they submitted a rough plan of the proposed alterations to the plaintiffs, and ultimately they gave notice to the plaintiffs that the defendant intended to erect a hoarding of the height of 60 feet, that being the height of the proposed new building. The hoarding was erected, and the plaintiffs thereupon issued the writ in this action and moved for an injunction. Upon the hearing of the motion, the defendant undertaking to remove the hoarding, it was ordered that the action should be immediately set down for trial, pleadings being dispensed with, and that the motion should stand till the trial.

At the trial it appeared from the plaintiffs' evidence that the old cottages had been in existence more than twenty years at the date of the rebuilding, and the plaintiffs then set up an alternative claim based upon the presumption of a lost grant.

W. F. Hamilton, Q.C. (*Upjohn, Q.C.*, with him), for the plaintiffs. The plaintiffs have retained in their existing building a substantial portion of the lights of the old houses, and they have not lost their rights by the rebuilding: *Tapling* v. *Jones* (1); *Scott* v. *Pape* (2); *Greenwood* v. *Hornsey*. (3) [He also referred to *Moore* v. *Hall* (4) as to the quantum of damage.]

Jenkins, Q.C., and *Sargant*, for the defendant. With regard to the first-floor windows the retention of ancient lights is merely trivial, and the plaintiffs must be taken to have abandoned their rights. The plaintiffs must shew an uninterrupted enjoyment for twenty years before action brought: *Presland* v. *Bingham* (5); *Cooper* v. *Straker* (6); *Hollins* v. *Verney*. (7)

[They also cited *Wheaton* v. *Maple & Co.* (8) upon the question of lost grant.]

Upjohn, Q.C., in reply, upon the question of what constituted an interruption of enjoyment, cited *Carr* v. *Foster* (9); *Cross* v. *Lewis* (10); upon the question of lost grant, *Aynsley* v. *Glover* (11); and upon the question of the right to an injunction, *Martin* v. *Price* (12); *Shelfer* v. *City of London Electric Lighting Co.* (13)

Cur. adv. vult.

March 29. STIRLING J. Two questions arise in this action —first, whether the plaintiffs are entitled to any ancient lights; secondly, if so, whether they are entitled to any and what relief in respect thereof. [His Lordship stated the facts as to the rebuilding and as to the preservation of the lights of the old houses, and he continued as follows:—]

The first point to be considered is whether the rights which the plaintiffs would have had if they had been owners of the old houses have been lost by reason of the alterations made in rebuilding. A question arose whether evidence of the intention

(1) (1865) 11 H. L. C. 290.
(2) (1886) 31 Ch. D. 554, 561.
(3) (1886) 33 Ch. D. 471.
(4) (1878) 3 Q. B. D. 178.
(5) (1889) 41 Ch. D. 268.
(6) (1888) 40 Ch. D. 21.
(7) (1884) 13 Q. B. D. 304.
(8) [1893] 3 Ch. 48.
(9) (1842) 3 Q. B. 581.
(10) (1824) 2 B. & C. 686.
(11) (1875) L. R. 10 Ch. 283.
(12) [1894] 1 Ch. 276.
(13) [1895] 1 Ch. 287.

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of those who rebuilt was admissible. Such evidence appears to have been held admissible in *Newson* v. *Pender* (1), and I allowed it to be given. It was to the effect that the building was not erected in accordance with the plan originally prepared, but in accordance with plans altered in order to preserve the ancient lights, both skylights and windows, in Nos. 29 and 30. From that the inference may be drawn that there was an intention to preserve the ancient lights on rebuilding. It appears to me, however, that, regard being had to the subsequent case of *Scott* v. *Pape* (2), such evidence is unnecessary. For that I shall read a passage from the judgment of Cotton L.J., who I think in the previous case of *Newson* v. *Pender* (1) inclined otherwise. The Lord Justice says (3): "The new building of the plaintiff is entirely different in character from the old building, and instead of having three rows of lights of rather a long shape, it is lighted by windows of an entirely different kind. One of the great contentions on behalf of the defendant has been this, that the plaintiff by the mode in which he has erected the new building has abandoned the old right which he formerly had. In my opinion that is an erroneous contention. Of course he has abandoned those old lights, the area of which is entirely occupied by a brick wall. He has put up that wall in such a way as to shew that he did not intend to use or enjoy that light which formerly went into the old building through those windows which are entirely blocked up; and in my opinion that would be sufficient to shew an abandonment as regards those windows. But the windows in question occupy a substantial portion of the space formerly occupied by the three windows in the old building; and although he has not constructed his building in such a way as to take all the light which formerly passed through the old windows in the old building, we should, I think, be coming to a wrong conclusion in holding that the plaintiff, having erected this building with the six windows occupying positions where they would receive a considerable portion of the light which went into the three old windows,

(1) (1884) 27 Ch. D. 43. (2) 31 Ch. D. 554.
(3) 31 Ch. D. 567.

intended in respect of these new windows to abandon such right as he formerly had." That passage, mutatis mutandis, appears to me to apply to the windows in respect of which the plaintiffs claim.

I now proceed to consider the further question which arises in regard to the windows on the first-floor. [His Lordship then referred to the evidence as to the boarding and shelving, and he continued as follows:—] It was contended that under these circumstances the right to the access to the light had not been made out in accordance with the terms of s. 3 of the Prescription Act. [His Lordship read the section.] It was said that it was necessary that not only should there be access of light, but a use made of it, and that that should be enjoyed without interruption. The first contention was that the erection of the boarding and shelving constituted an interruption within the meaning of the section. The term "interruption," however, in s. 3 bears the same meaning as in s. 4, and refers to an adverse obstruction, and not a mere discontinuance of user: see *Carr* v. *Foster* (1); *Hollins* v. *Verney*. (2)

It was then urged that the use of the light had not been actually enjoyed for the statutory period. On this there are some decisions to which it is desirable to refer. In the case of *Courtauld* v. *Legh* (3), and again in *Collis* v. *Laugher* (4), it was held not to be necessary to the acquisition of a right of the access of light under s. 3 of the Prescription Act that the building in respect of which the light is claimed should be occupied, or even fit for occupation, during the specified period. The precise point decided was that personal occupation was not a necessary ingredient in the user referred to in the Act. In *Courtauld* v. *Legh* (3) Kelly C.B. refers to the user which may be enjoyed of light and air in preventing dry rot and other mischief which happen in vacant houses, and in *Collis* v. *Laugher* (4) Romer J. refers to the use which might be made of the light by the workmen employed to complete an unfinished carcase. For the present case it is more material to refer to the passage in the judgment given by Channell B., in which

(1) 3 Q. B. 581.
(2) (1884) 13 Q. B. D. 304, 307.
(3) (1869) L. R. 4 Ex. 126.
(4) [1894] 3 Ch. 659.

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he refers to the use of shutters. He says (1): "The Act does not refer to any particular mode of enjoyment, and, without any straining of its language, we may hold that, where a house exists with ordinary windows (not, for instance, windows with iron shutters fixed behind them), through which light and air have passed in fact, the words of the statute are quite satisfied, and it is no objection that, for some purposes, the house is not beneficially occupied." In the case of *Cooper* v. *Straker* (2) Kay L.J., then a judge of first instance, held that the owner of a building having windows with movable shutters acquired a right to light under s. 3 of the Prescription Act if he opened the shutters at any time he pleased for the admission of light during those twenty years; and there are some passages in his judgment which it is desirable to quote. Referring to s. 3, he says (3): "The section requires that two things shall have been enjoyed: 'access,' which, I think, means over the neighbour's land; and 'use,' which must be the use of light so coming by the person who claims the right conferred by the statute. Both that access and use must have been actually enjoyed with the house and for the full period of twenty years without interruption." Then, after referring to some cases, he says: "The argument is that the plaintiffs have not enjoyed the use of light to these windows, or at any rate to the ground-floor window, within the meaning of the statute. That depends upon the signification of the words 'actually enjoyed.' Enjoying the use cannot mean shall have continuously used. If that had been the intention of the statute some such word as 'continuously' should be found in this section, and it might then be necessary to shew that the plaintiffs had never closed their shutters for a day during twenty years next before the action. I take 'enjoyed' to mean 'having had the amenity or advantage of using' the access of light; that is nearly equivalent to 'having had the use,' the intention being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during twenty

(1) L. R. 4 Ex. 129. (2) 40 Ch. D. 21.
(3) 40 Ch. D. 26.

years." Then he refers to the passage in the judgment of Channell B. in *Cortauld* v. *Legh* (1), to which I have already referred, saying: "Channell B. intimates that there might be an exception in the case of 'windows with iron shutters fixed behind them,' but the essential word in that sentence is 'fixed,' which obviously means either shutters that will not open, or shutters that are never, in fact, opened during the twenty years." The learned judge expressly laid it down that continuous user is not necessary, and with this view of the law I desire to express my entire agreement. Not only, as is pointed out by Kay L.J., is the word "continuous" not found in the Act, but there appear to me to be strong reasons against such a construction of it. For instance, it is a matter of common knowledge that in this country shops have their shutters regularly closed for one whole day in the week and occasionally at other times. It cannot have been intended that this class of property should be excluded from the benefit of the Act. The conclusion appears to me also to be really involved in the decisions that the right is not lost by rebuilding, for, when one building is pulled down and another built on the site, there must in most cases at least be an interval when there is no actual enjoyment of the light in connection with any building.

This being so, it seems to me that the rule laid down with regard to user in the case of discontinuous easements applies to user in connection with light. That rule was stated by the present Master of the Rolls in the case of *Hollins* v. *Verney* (2), where the point was very much considered in connection with a right of way. He says (3): "The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that having regard to s. 6 and the other provisions of the statute there is no evidence on which the jury can properly find such enjoyment." In my opinion, therefore, the question as regards the

(1) L. R. 4 Ex. 126.
(2) 13 Q. B. D. 304.
(3) 13 Q. B. D. 309.

STIRLING J. actual enjoyment of the right is one of fact to be decided on the circumstances of each case.

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Before I proceed to apply that to the present case, there are two observations which I think I may properly make. First of all, I think that non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the Act. Secondly, I do not think that the user or non-user of the light can be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable. I am not sure that either Channell B. or Kay L.J. intended to intimate this; but it would seem to me that, although fixedness or movability of the obstacle are no doubt elements, and important elements, to be taken into consideration, the decision of each case must turn on all the circumstances which are brought before the Court.

Guiding myself by this rule, I have two matters in the present case to deal with: first, the boarding over of parts of the windows, and, secondly, the shelving. Now, as regards the boarding over of part of the windows, the plaintiffs being in occupation and carrying on their ordinary business, have, for upwards of a year, absolutely excluded the light which arrived at those portions of the windows. I cannot see my way to say that there has been, as to the portions of the windows Nos. 1 and 7 which were boarded over, a user of the light actually enjoyed for the prescriptive period. On the other hand, the shelving did not entirely exclude the light, but allowed a substantial portion of it to pass, and I think that a sufficient case is made out, therefore, as regards the window No. 4.

It was, however, contended that, as regards the portions of the windows which were boarded up, sufficient evidence had been given to establish a title under a lost grant. It is laid down in *Aynsley* v. *Glover* (1) that a plaintiff may establish his right in this way, and there are observations to the same effect of Lord Blackburn in advising the House of Lords in *Dalton* v. *Angus*. (2)

Now, in the present case the action was tried without plead-

(1) L. R. 10 Ch. 283. (2) (1881) 6 App. Cas. 740, 814.

ings, as the result of an order made on motion. The affidavits on the motion did not direct the attention of the defendant to this mode of making out a title. If pleadings had been delivered, I take it it would have been necessary to plead in terms that it was proposed to make out a title by founding it on a lost grant. The plaintiffs' evidence did, however, go to shew that the old cottages now pulled down did enjoy access of light to the windows for more than twenty years before they were pulled down. On the second day of the trial, after the plaintiff Mr. Hall had been cross-examined, the learned counsel for the plaintiffs expressed his intention of availing himself of this right. The learned counsel for the defendant took the objection that this course was not open to the plaintiffs. I think, however, that it was open to the plaintiffs, subject only to the defendant having an opportunity of adducing evidence for the purpose of rebutting the presumption which arises from twenty years' enjoyment. The matter is one which deserves careful investigation, especially having regard to the various views which have prevailed in recent times with reference to the nature of the title derived under a lost grant; and, having regard to the course which the case took at the trial, I think that, although I am not prepared to shut out the title of the plaintiffs entirely on that ground, I ought not to decide the question on the present materials, but that if the parties desire to press this view of the case further an opportunity should be given to the defendant of adducing evidence for the purpose of rebutting the presumption which I have mentioned. In that state of things I am prepared to make a declaration to the following effect: Declare that the plaintiffs are entitled to the enjoyment as ancient lights of such portions of the skylight and windows which were formerly enjoyed on the ground and first floor of the messuages Nos. 28, 29, and 30, Hutton Street, as were not blocked up in the rebuilding of the plaintiffs' premises, or have not been subsequently boarded up. As regards the portions of the windows which were boarded up, I will either allow further evidence to be adduced by the defendant before the judgment is drawn up; or, if it is thought more convenient, I am willing to frame the judgment in such a way that

STIRLING J. either party shall be at liberty to apply for a further declaration on the subject.

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I now consider the second question which arises—namely, whether any and what further relief ought to be granted. With reference to this, it is material to consider the circumstances under which the action was brought. [His Lordship referred to the correspondence and to the erection of the hoarding, and continued as follows:—]

If I thought that when this action was brought the defendant actually threatened and intended to raise a building 60 feet high in the position in which that hoarding was placed, I should consider the plaintiffs entitled to an injunction in the ordinary *Yates* v. *Jack* (1) form. But I think, upon looking at the correspondence, that the object of the defendant was rather to ascertain what the plaintiffs' rights were than to infringe them. If, therefore, the defendant is willing to undertake to give the plaintiffs reasonable notice of his intention to build, and at the same time to produce to the plaintiffs upon request his building plans, it seems to me that the rights of the plaintiffs would be amply protected by reserving them liberty to apply hereafter for an injunction. Of course, as regards the costs of the action, the defendant, failing to establish that he was entitled to obstruct the light, must bear the costs.

Solicitors: *James White & Leonard; Ranger, Burton & Frost.*

(1) (1866) L. R. 1 Ch. 295.

H. B. H.

In re GOY & CO., LIMITED. FARMER *v.* GOY & CO., LIMITED.

STIRLING J.
1900
March 6, 7, 31.

[1898 G. 900.]

Company—Debentures—Winding-up—Debenture-holder's Action—Judgment—Transfer—Cross-claim by Company against Transferor—Right to Registration.

After resolutions for the voluntary winding-up of a company had been passed and a liquidator appointed, and judgment had been given in a debenture-holder's action against the company, R. became transferee, by way of security for a loan, of certain debentures from C., who had been a director of the company. The conditions of the debentures provided that transfers must be delivered at the registered office of the company with a fee, and such evidence of identity or title as the company might reasonably require, and thereupon the transfers would be registered; and that the principal and interest secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder. After R. had taken his transfer it was discovered that C. had been guilty of misfeasance, and he was ordered to pay a sum of money to the liquidator in respect thereof. R., who had had no notice of any cross-claim by the company, duly sent his transfer to the liquidator, who was also receiver in the action, for registration, but the liquidator declined to register it, and claimed to deduct C.'s debt to the company from the amount due on his debentures:—

Held, that the right to transfer and to have the transfer registered was not affected either by the winding-up or by the judgment in the action, and that consequently R. was entitled to receive without deduction any dividend payable in respect of C.'s debentures.

THIS was the further consideration of a debenture-holder's action raising the question whether G. D. Robey, who, since the judgment in the action, had become the transferee from J. H. Chandler of certain debentures, was entitled to be paid anything in respect of those debentures until payment had been made of a sum which Chandler had been ordered to pay to the liquidator of the company.

The debentures in question formed part of an issue of sixty debentures of 100*l.* each made in October, 1897. By each debenture the company charged its undertaking and all its property, both present and future, including its uncalled capital.

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The conditions indorsed upon the debentures provided, inter alia, (4.) that every transfer must be delivered at the registered office of the company with a fee of 2*s.* 6*d.*, and such evidence of identity or title as the company might reasonably require, and thereupon the transfer would be registered, and a note of such registration would be indorsed thereon. Condition 6 provided that the principal and interest secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder thereof.

On May 12, 1898, a resolution was passed for the voluntary winding-up of the company, and W. H. Doggett was appointed liquidator. Upon the passing of this resolution the principal sums secured by the debentures became payable. On June 9, 1898, Doggett was appointed receiver in the action, and on June 11, 1898, the usual judgment in a debenture-holder's action was pronounced, directing, amongst other inquiries, an inquiry (1.) what debentures had been issued by the defendant company and who were the present holders thereof, and (3.) what was the property comprised in the said debentures. Amongst the holders of debentures at the date of the judgment was J. H. Chandler, who had been a director of the company. In August, 1898, he applied to Robey for an advance on his debentures. On September 1, 1898, Robey's solicitor wrote to the liquidator and receiver, making inquiries about the debentures, and asking whether there were any cross-claims by the company against Chandler. On September 2 Doggett sent a letter answering some of the inquiries, but taking no notice of that as to cross-claims. An interview afterwards took place between Robey and Doggett, at which, according to the former, Doggett stated that he was not aware of any cross-claims; but Doggett denied this, and said that he never gave any answer to the inquiry on the subject.

On September 14, 1898, Robey made an advance to Chandler on the security of a mortgage and transfer of the debentures. On September 22, 1898, Robey's solicitor sent the transfer to Doggett for registration. Doggett referred the matter to the solicitor acting in the proceedings, but that gentleman thought that, having regard to the judgment in the action, there was a

difficulty as to registration, and after some correspondence Robey's solicitor, on October 14, 1898, gave Doggett formal notice requiring him to register the transfers.

On November 7, 1898, Doggett's solicitor wrote to Robey's solicitor as follows: "Referring to my recent correspondence with you respecting the debentures standing in the name of Mr. J. H. Chandler and to the transfers of these debentures which you sent to Mr. Doggett, I have now brought the facts before the master, who has given directions that on the transfers being verified in the usual way the receiver and manager is to enter a note of the transfers on the register, but not to enter the transferee's name therein. Having regard to these directions, shall I return the transfers to you for verification."

In October, 1898, Doggett discovered that Chandler had been guilty of misfeasance in respect of a sum of 300*l.*, which had come to his hands as a director of the company, and on March 16, 1899, Chandler was ordered, upon a summons in the winding-up, to pay that sum to the liquidator.

On February 3, 1899, the master made his certificate in answer to the inquiries directed by the judgment in the action. In the schedule to the certificate the debentures in question were thus dealt with. In a column headed "Name of present holder" occurred the following entry: "Chandler, James Harvey (the registered holder at date of liquidation), and Robey, G. D., the transferee of the debentures by indenture of transfer dated the 14th September, 1898, subsequent to date of liquidation of the said defendant company, as part security to secure 600*l.* and interest and costs under a certain deed of defeasance dated 14th September, 1898, and certain other liabilities under a memorandum of charge also dated 14th September, 1898, in the body of the certificate respectively mentioned. Proceedings are pending against the said J. H. Chandler in respect of a claim by the defendant company as stated in the body of the certificate." And in the schedule of the particulars of the property comprised in the debentures the following item appeared: "A sum of 300*l.* and interest claimed from J. H. Chandler (who is also a debenture-holder) in respect of moneys alleged to have been received by him to the use of

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the defendant company and appropriated by him to his own use. Proceedings for the recovery of this sum are at present pending by leave of the judge."

Under these circumstances the above-mentioned question now came before the Court on further consideration.

Jenkins, Q.C., and *A. àB. Terrell*, for Robey. The company could not, having regard to the form of the debentures, properly refuse to register the transfer. It has contracted itself out of the right to object on the ground of equities subsisting between the company and the transferor: *In re Agra and Masterman's Bank* (1) and *In re Blakely Ordnance Co.* (2) Moreover, the entry of the note in the register by order of the Court is equivalent to registration. Robey had an unconditional right to registration of his tranfers within a reasonable time after September 22, 1898: *Société Générale de Paris* v. *Walker* (3); *Roots* v. *Williamson* (4); *Moore* v. *North Western Bank.* (5) At the time of the assignment of the debentures there was no debt due from Chandler to the company. There was an unliquidated liability, no doubt. If Chandler were suing the company, it would have been a case of set-off, but there can be no set-off against Chandler's assignee, nor have the company any right of retainer as against him: *Ex parte Theys* (6); *Ex parte Pelly* (7); *Christie* v. *Taunton, Delmard, Lane & Co.* (8)

Upjohn, Q.C., and *C. T. Mitchell*, for the debenture-holders. This case is not governed by any principle of set-off. It depends upon the rule of equity that where a person is entitled to a share of a fund to which he is also liable to contribute, he cannot receive his share until he has discharged his obligation to contribute: *In re Akerman.* (9) It is said that something took place which was equivalent to registration of the transfer, but Chandler is still on the register, and the Court will not look beyond it. *Société Générale de Paris* v. *Walker* (3) and

(1) (1867) L. R. 2 Ch. 391.
(2) (1867) L. R. 3 Ch. 154.
(3) (1885) 11 App. Cas. 20.
(4) (1888) 38 Ch. D. 485.
(5) [1891] 2 Ch. 599.
(6) (1884) 25 Ch. D. 587.
(7) (1882) 21 Ch. D. 492.
(8) [1893] 2 Ch. 175.
(9) [1891] 3 Ch. 212.

Roots v. *Williamson* (1), so far as they are applicable to the present case, are in favour of our contention.

[STIRLING J. Could the company refuse to register the transfer, having regard to condition 4?]

After judgment in the action the company could not properly be called upon to do anything which would have the effect of altering the rights of the parties. That being so, condition 4 does not apply. We rely on the observations of Cotton L.J. in *Ex parte Theys*. (2) See also *Grissell's Case* (3) and *In re Auriferous Properties*. (4) *Ex parte Pelly* (5) was purely a case of set-off, and is quite irrelevant to the present case.

March 31. STIRLING J. (after stating the facts). It was suggested that the liquidator and receiver had so conducted himself as to be precluded from raising the question. I see no ground for such a contention. On the other hand, Mr. Robey has clearly become transferee for value and in good faith, and is fully entitled to whatever benefit may accrue from that position. I shall first consider how the case would have stood if Chandler had remained the owner of the debentures. In that case he would, on the one hand, have been entitled to receive out of the property comprised in his debentures a dividend thereon, and on the other he would have been liable to contribute to that same property a sum of 300*l*. It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the same fund. Under such circumstances the Court in effect says to the person claiming to be paid, "You have in your own hands that which is applicable to the payment—pay yourself out of that." This has been done on the distribution of the residuary estate of a testator where a person entitled to a share is also indebted to the estate: *Willes* v. *Greenhill* (6); *In re Akerman* (7); *In re Watson*. (8) Where two companies were in liquidation and

(1) 38 Ch. D. 485.
(2) 25 Ch. D. 593.
(3) (1866) L. R. 1 Ch. 528.
(4) [1898] 2 Ch. 428.
(5) 21 Ch. D. 492.
(6) (1860) 29 Beav. 376.
(7) [1891] 3 Ch. 212.
(8) [1896] 1 Ch. 925.

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one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid: *In re Auriferous Properties.* (1) In *Ex parte Theys* (2) Cotton L.J. said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled. In my opinion it is applicable to the present case, so that Chandler could not have claimed payment of a dividend until he had paid the 300*l.* Then arises the question whether Chandler's transferee is in a better position. As a general rule, the transferee of a chose in action stands in no better position than his transferor. There is nothing, however, to prevent a debtor from contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his. See *In re Agra and Masterman's Bank* (3) and *In re Blakely Ordnance Co.* (4) It is contended that such a contract exists in the present case. [His Lordship then referred to the conditions of the debentures, and continued:—] It seems to me that condition 4 imposes an absolute obligation on the company to register a transfer upon that transfer being delivered at the registered office of the company with a fee of 2*s.* 6*d.*, and such evidence of title or identity as the company might reasonably require. It was suggested that this applied only while the company was a going concern, but the only ground urged was the reference to the registered office. I cannot, however, see that the company could escape from the obligation by ceasing to have a registered office. Sect. 131 of the Companies Act, 1862, provides that "whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding-up shall be void, but its corporate

(1) [1898] 2 Ch. 428.
(2) 25 Ch. D. 587, 593.
(3) L. R. 2 Ch. 391.
(4) L. R. 3 Ch. 154.

state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up."

That section does not prohibit or interfere with transfers of choses in action after the commencement of a winding-up. The powers of the company continue, and so do the obligations. In my opinion the right to transfer and to have the transfer registered is not affected by the winding-up. It is said, however, that the requirements of condition 4 have not been satisfied. It was admitted in argument that the fee of 2*s.* 6*d.* had been paid or tendered. It was contended that the transfers had not been verified as required by the letter of November 7, 1898. There is no evidence before me on the point; but the master must have been satisfied, otherwise he would not have certified as he has done. Even if it were otherwise, it would seem to me that it is not too late even now to make the proper entry on the register. The company has for valuable consideration renounced any right it would otherwise have had to object to transfers on the ground of equities subsisting between the company and the transferor; and, under circumstances such as exist in the present case, mere delay seems immaterial. It is said, however, that the equity which is set up is not that of the company, but of the other debenture-holders, and that the right to transfer cannot be insisted on after judgment has been given in a debenture-holder's action, at all events to their prejudice. The title of the debenture-holders to the 300*l.* is derived from the fact that that sum is part of the property of the company. The debenture-holders all hold their debentures under the same conditions, one of which is that the moneys secured by any debenture are to be paid without regard to any equities between the company and the original or any intermediate holder. That is a stipulation for the benefit of the debenture-holders, and is one to which debenture-holders attach great importance. I think that the debenture-holders take this piece of property subject to the same obligations as the company, and that they no less than the company are precluded by the conditions from asserting this equity against a transferee.

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I am unable to see that the judgment in the action affects the right to transfer; and in my judgment Mr. Robey is entitled to receive the dividend payable in respect of Mr. Chandler's debentures.

Solicitors: *T. Lamartine Yates*; *S. J. R. Stammers.*

G. A. S.

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1900

Jan. 27; *March* 1, 6; *April* 5.

JACOB *v.* DOWN.

[1898 J. 1774.]

Landlord and Tenant — Lease — Covenant to Build—Covenant to Repair—Continuing Breach—Waiver—Recovery of Possession—Notice of Breach—Sufficiency—Relief against Forfeiture—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The plaintiffs demised to the defendants a piece of land, and the defendants covenanted within twelve months to erect certain buildings thereon, and also at all times during the term of the lease to keep the premises "so to be erected as aforesaid in good and substantial repair, and the same in good and substantial repair" to deliver up at the expiration of the term. The lease contained a proviso for re-entry on breach of any of the lessees' covenants. The buildings were never erected, but the plaintiffs accepted the quarter's rent which accrued next after the expiration of the twelve months limited for the erection of the buildings. The plaintiffs afterwards served upon the defendants a notice under the Conveyancing Act, 1881, s. 14, referring to the building covenant only, and calling upon the defendants to erect the buildings. In an action for recovery of possession:—

Held, that the building covenant was broken once for all at the expiration of the twelve months, and was not a continuing covenant; that the repairing covenant implied an obligation to erect the buildings, and there was, therefore, a continuing breach of it; but that inasmuch as the notice under the Conveyancing Act only referred to the building covenant as to the breach of which there was a waiver, and did not mention the breach of the repairing covenant, the notice was insufficient and the action failed.

THIS was an action to recover possession of a piece of land in Cardiff, held by the defendants under a lease dated June 4, 1894, for an alleged breach of covenants therein contained.

The lease was made between a tenant for life (on whose death on November 22, 1895, the plaintiffs became entitled in possession to the property) and the defendants. By the lease the

lessor demised for a term of twenty-one years from November 27, 1893, a piece of land with four messuages or dwelling-houses erected thereon, and full licence and authority for the lessees at any time within twelve months from the date of the lease to pull down the same, and within the same period to erect good and substantial premises thereon in accordance with a building covenant by the defendants to erect the premises therein specified at a cost of not less than 2500*l*. The lease also contained a covenant by the lessees to "at all times during the said term keep the said messuages and premises so to be erected as aforesaid in good and substantial repair, and the same in good and substantial repair deliver up to the lessor at the expiration or sooner determination of the said term"; and after other covenants there was a proviso for re-entry on "any breach or non-observance of any of the lessee's covenants." On June 20, 1895, the lessor's representatives wrote to the defendants complaining that they had taken no steps to comply with the building covenant. The rent which fell due on August 27, 1895, was paid by the defendants and accepted on behalf of the lessor; the rent which accrued due subsequently to that date was paid and received without prejudice to the question between the parties. The messuages had never in fact been built. On August 8, 1898, the plaintiffs served a notice under the 14th section of the Conveyancing Act, 1881, upon the defendants which set out the building covenant, and that alone, stated the breach of it, and called upon the defendants to erect the buildings, in default of which the lessors would sue for recovery of possession. The writ in the action was issued on November 5, 1898, and the statement of claim, which did not mention the repairing covenant, was delivered on December 6. The defendants in their defence expressed their willingness to perform the covenant, but submitted that there was a waiver of the breach of the covenants by the acceptance and receipt of rent. They counter-claimed for relief from forfeiture.

Jenkins, Q.C., and *St. J. Clerke*, for the plaintiffs. The plaintiffs are entitled to re-enter and to recover mesne profits,

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i.e., the arrears of rent since the last payment. The defendants admit the breach of the covenant to build, but allege that the plaintiffs have waived the breach by the acceptance of rent. We submit that that is immaterial, because there is a continuing breach. The date fixed for the erection of the buildings was not of the essence of the covenant. Moreover, if the covenant to build has been broken, then of necessity there must also be a breach of the covenant to repair. There is no evidence of any bonâ fide intention to perform the covenants, and, having regard to the lapse of time, the lessees are not entitled to any relief except upon proper terms as to security for the performance of the covenants.

Upjohn, Q.C., and *Kenyon Parker*, for the defendants. First, we say there is no continuing breach of covenant. The covenant to build was broken once for all on June 4, 1895. Secondly, that breach has been waived (1.) by the receipt and acceptance on October 5, 1895, of the quarter's rent due on August 27, 1895, after notice had been given of the breach; (2.) by conduct in treating the lease as a continuing one.

The lease expressly makes time of the essence of the covenant. For a continuing breach there must be a continuing covenant.

The plaintiffs cannot sue upon the covenant to repair because a sufficient notice under s. 14 of the Conveyancing Act, 1881, has not been given: *Fletcher* v. *Nokes*. (1) The notice must be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying the breach before action brought: *Horsey Estate, Limited* v. *Steiger*. (2) Moreover, the covenant to repair does not arise until the buildings are erected and the subject-matter is thereby brought into existence: *Coward* v. *Gregory* (3); *Taylor* v. *Caldwell*. (4)

[*Jenkins, Q.C.*, referred to *Sampson* v. *Easterby*. (5)]

That authority does not affect the present case, because here there is an express covenant.

(1) [1897] 1 Ch. 271.
(2) [1899] 2 Q. B. 79.
(3) (1866) L. R. 2 C. P. 153.
(4) (1863) 3 B. & S. 826, 838.
(5) (1829) 9 B. & C. 505; 33 R. R. 239.

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Jenkins, Q.C., in reply. Looking at the whole lease, the period of twelve months is not of the essence of the covenant. If the covenant to repair does not arise until the buildings are erected, then, supposing the buildings are not erected until after the specified term, the covenant to repair can never apply at all. A continuing covenant to build is implied from the covenant to repair.

The notice under the Conveyancing Act need not point out the specific covenant which is to be sued upon. All that is necessary is to put the lessee in a position to understand what is complained of. The notice in this case is sufficient for that purpose.

[His Lordship having expressed his desire to hear further argument upon the question whether the covenant to repair did not arise until the buildings were erected, the case came on again upon March 1.]

Jenkins, Q.C., and *St. John Clerke*, for the plaintiffs. Assuming that the covenant to build is gone, the covenant to repair implies a covenant to build. Where a tenant covenants to keep in repair and give up in repair premises actually built, he is bound to rebuild the premises if they are burnt down: *Clark* v. *Glasgow Assurance Co.* (1) The principle in that case applies here.

The meaning of a covenant to keep in repair is explained in *Proudfoot* v. *Hart* (2) and *Payne* v. *Haine*. (3)

Upjohn, Q.C., and *Kenyon Parker*, for the defendants. A covenant to repair can have no effect until the thing to be repaired is in existence. In *Sampson* v. *Easterby* (4), where a lease contained a recital of an agreement to erect a building followed by an express covenant to keep the new building in repair, it was held that that amounted to a covenant in law to erect the building. That decision was founded upon the effect of the recital; but the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-

(1) (1854) 1 Macq. 668.
(2) (1890) 25 Q. B. D. 42.
(3) (1847) 16 M. & W. 541.
(4) 9 B. & C. 505, 512; 6 Bing. 644; 33 R. R. 239.

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matter: *Dawes* v. *Tredwell* (1), per Jessel M.R.; Elphinstone on Interpretation of Deeds, p. 143. Here the express covenant to build negatives any implied covenant, and the maxim "Expressum facit cessare tacitum" applies.

An implied covenant to build is not a continuing covenant: *Coward* v. *Gregory*. (2) If it were so, the period of twenty years prescribed by the Statute of Limitations would not commence to run until the expiration of the lease. This would produce an extraordinary result in the case of a building lease for ninety-nine years. But no new covenant to build can be implied in such a case as this. If such a covenant be implied, it must be a covenant to build at all times during the term. A covenant to build is in its nature not a continuing covenant. The plaintiffs have sued upon the wrong covenant, and their action is not maintainable.

[They also referred to *Bullock* v. *Dommitt*. (3)]

Jenkins, Q.C., in reply.

Cur. adv. vult.

April 5. STIRLING J. (after stating the facts). The first question is whether there is a continuing breach of any and which of the covenants in the lease. This is of course a question of construction of the document itself.

For the plaintiffs it was contended that the building covenant was in substance one for the erection of these houses, and that the period of twelve months mentioned therein was not of the essence; and, further, that at all events there was a continuing breach of the repairing covenant. For the defendants it was said that the building covenant was completely broken at the end of the period of twelve months specified, and that the repairing covenant did not apply unless and until the new houses were built.

As regards the building covenant, a very similar point was raised in *Bennett* v. *Herring* (4), but was not there decided, though the view contended for on behalf of the plaintiffs

(1) (1881) 18 Ch. D. 354, 359.
(2) L. R. 2 C. P. 153.
(3) (1796) 6 T. R. 650; 3 R. R. 300.
(4) (1857) 3 C. B. (N.S.) 370.

seems to have found favour with some of the learned judges. But it was held in *Coward* v. *Gregory* (1) that a covenant forthwith to put the demised property in good and tenantable repair could only be broken once. In my judgment that is equally true of the building covenant in the present case, and I come to that conclusion the more readily by reason of the opinion which I have formed, and which I am about to express, with reference to the repairing covenant.

A covenant to keep in good repair imposes an obligation to put in repair premises which at the time of the demise were not in repair. That has been decided in *Payne* v. *Haine* (2); *Proudfoot* v. *Hart*. (3) It also imposes an obligation to rebuild the demised premises if these are destroyed by fire during the term: see, for example, *Bullock* v. *Dommitt* (4) and *Clark* v. *Glasgow Assurance Co.* (5) In *Bennett* v. *Herring* (6), already cited, a lease contained covenants by the lessee to complete within two months two messuages described as having been lately erected, and to keep "the said messuages and premises" in repair during the term. The messuages were never completed, and it was held that there was a breach of the covenant to repair. It is to be observed, however, that in this case the covenant related to messuages which were treated as being in existence though not complete at the time of the demise. None of these authorities completely covers the present case, but they go far to shew that such a covenant imposes an obligation to do everything necessary in order that the premises may be found during the term in existence and in a proper state of repair. Here the covenant is not to keep in repair "the messuages and premises if and when erected," but "the said messuages and premises so to be erected as aforesaid," words which seem to me to refer simply to the nature and character of the messuages and premises, and not to the time of their erection. The object of the covenant is to secure that at all proper times the messuages referred to shall be in proper repair; and in my opinion the covenant imposes an obligation to do all things

(1) L. R. 2 C. P. 153.
(2) 16 M. & W. 541.
(3) 25 Q. B. D. 42.
(4) 6 T. R. 650; 3 R. R. 300.
(5) 1 Macq. 668.
(6) 3 C. B. (N.S.) 370.

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necessary for that purpose, including the erection of the messuages, if not completed within the period prescribed in the building covenant. If this be not so, it seems to me that the lessee by omitting to perform the building covenant might practically escape from any obligations of the lease. In my judgment, therefore, there is no continuing breach of the building covenant, but there is a continuing breach of the repairing covenant.

This being so, the question arises whether the notice under the Conveyancing Act, 1881, was sufficient. The 14th section of that Act prescribes: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of." The form of notice required was considered by the Court of Appeal in the case of *Horsey Estate, Limited* v. *Steiger* (1), where Lord Russell C.J., in delivering the judgment of the Court, says (2): "To determine the character of the required notice, what it shall contain and when it ought to be given, it is necessary to consider the scope of s. 14 of the Act of 1881 as a whole. The object seems to be to require in the defined cases (1.) that a notice shall precede any proceeding to enforce a forfeiture, (2.) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3.) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

In the present case the plaintiffs were not in a position to

(1) [1899] 2 Q. B. 79. (2) [1899] 2 Q. B. 91.

rely on the breach of the building covenant, for that breach had been waived by acceptance of rent. There is a continuing breach of the repairing covenant, but this is not mentioned in the notice or the statement of claim.

Under these circumstances, in my judgment the notice was not sufficient because it did not give the defendants adequate information as to the case alleged against them. I think that the defendants were entitled to rely on their defence to the breach of the building covenant, and that, if the plaintiffs desired to insist on the continuing breach of the repairing covenant, they ought to have given the defendants notice thereof: all the more that it is not without difficulty that I have arrived at the conclusion already stated. The result is that the action fails, and must be dismissed.

Solicitors for plaintiffs: *Warriner & Co., for W. Lyndon Moore, Newport.*

Solicitors for defendants: *Downing, Bolam & Co., for Downing & Handcock, Cardiff.*

G. A. S.

STIRLING J.

1900

March 30;
April 3, 4;
May 1.

In re WESTON.
DAVIES *v.* TAGART.

[1899 W. 3957.]

Trustee—Retainer—Separation Deed—Trust of Leasehold Property in favour of Husband—Covenant by Husband to Pay Annuity to Wife—Default in Payment — Retainer of Trust Property to Satisfy Annuity — Deed—Construction—Recital—Implied Covenant.

By a separation deed, after reciting that the husband and wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds, in the events which happened, in trust for himself, and he covenanted to make up the wife's income to 300*l.* a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, and in 1868 he was adjudicated a bankrupt. The trustees proved for arrears due down to the date of the bankruptcy, but there were further arrears due to them since that date. On the death of the wife the husband's assignee in bankruptcy claimed the leaseholds:—

Held, that a covenant by the wife to live apart ought to be implied from the recital; that consequently there was valuable consideration for the husband's covenant; and that the trustees were entitled to retain the leaseholds until the arrears were satisfied.

Semble, the right of trustees to retain trust property as against a beneficiary who owes money to them as trustees under the instrument creating the trust exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the Court.

ORIGINATING SUMMONS.

By a separation deed dated September 1, 1864, made between Edward Weston of the first part, Ann Weston, his wife, of the second part, and certain trustees of the third part, it was recited that unhappy differences had arisen and were subsisting between Edward Weston and Ann Weston, and by reason of the same they had agreed to live separate and apart from each other, and that Edward Weston had agreed to make such provision and settlement and enter into such covenants as were thereinafter contained; and in pursuance of such agreement Edward Weston assigned to the trustees certain leasehold pro-

perty upon trust to pay the rents to Ann Weston during her life for her separate use (subject to the discontinuance of the same as afterwards mentioned), and after her decease upon trust for sale and payment out of the net proceeds to such one or more of them, Walter Weston and Annie Weston, two of the children of Edward and Ann Weston, as should be then living, and if neither of the said children should be then living the net proceeds were to be in trust for Edward Weston, his executors, administrators, and assigns absolutely. And the said Edward Weston, for himself, his executors, and assigns, thereby covenanted with the said trustees, their executors, administrators, and assigns, "that when and so often during the life of the said Ann Weston as the net rents and annual produce of the said premises hereby assigned and for the time being available for this purpose shall not be sufficient to pay or shall not amount to the sum of 300*l.* sterling by or at the end of the then current year then he the said Edward Weston his heirs executors and administrators will on demand in writing by the said trustees or other the trustees or trustee hereof for the time being pay to them or him the sum of 300*l.* sterling or such sum as with the rents and profits in that year actually received shall amount to the sum of 300*l.* sterling such sum to be held in trust for and to be paid to the said Ann Weston for her own sole or separate use."

The deed contained a proviso for determination if Ann Weston should return or attempt to return to cohabitation or should institute or attempt to institute any proceedings against Edward Weston for restitution of conjugal rights, and in certain other events not material to be stated. It also contained a covenant by Edward Weston that Ann Weston should be allowed to live apart from him; but it contained no covenant by Ann Weston or by any one on her behalf.

On May 26, 1868, Edward Weston was adjudicated a bankrupt, and he obtained his discharge in the same year. The trustees of the deed proved in the bankruptcy for the arrears down to the bankruptcy under the covenant; but under the law of bankruptcy as it then stood no proof could be carried in in respect of the future liability of the bankrupt under the

STIRLING J. covenant, and it was conceded that his discharge did not free him from that liability.

1900

WESTON, *In re.* DAVIES *v.* TAGART.

Edward Weston died in 1872.

Ann Weston died on May 6, 1899, having survived her two children named in the deed. She made a will, of which the applicant and the respondent William Tagart were executors. The other respondent was the assignee in the bankruptcy of Edward Weston.

Edward Weston failed after his bankruptcy to perform the covenant on his part to make up the income of Ann Weston to 300*l.*; and a large sum was due from him under that covenant. Part of the leasehold property was taken compulsorily by the London School Board, and the purchase-money had been invested in 1862*l.* 11*s.* 10*d.* South Australian stock. The rest of the property remained in the same state as at the date of the settlement. The assignee in bankruptcy of Edward Weston claimed to have the property subject to the trusts of the settlement transferred to him. The respondent Tagart claimed that the property ought not to be so transferred until the liability of Edward Weston under his covenant in the deed was satisfied.

This summons was taken out by the sole surviving trustee of the deed to determine, in substance, which of these claims ought to prevail.

Eustace Smith, for the summons.

Jenkins, *Q.C.*, and *Martelli*, for the respondent Tagart. The assignee in bankruptcy cannot stand in any better position than Weston, who was liable to pay the sums as they fell due. The trustees of the deed are entitled as against him to retain the fund until the covenant has been performed: *Burridge* v. *Row* (1); *In re Watson* (2); *Stammers* v. *Elliott*. (3)

Upjohn, *Q.C.*, and *Whinney*, for the assignee in bankruptcy of E. Weston. The cases cited have no application to the present case. Here there is only one settled property, which

(1) (1842) 1 Y. & C. Ch. 183, 192. [This case was affirmed on appeal (1844) 13 L. J. (Ch.) 173; 8 Jur. (O.S.) 299.]

(2) [1896] 1 Ch. 925.

(3) (1868) L. R. 3 Ch. 195.

was brought into settlement by the husband. Under the settlement, in the events which have happened, there is an absolute limitation to the husband, and there is a covenant in gross by him to make up the wife's income to 300*l.* a year. The only person interested under that covenant was Mrs. Weston, who is now dead. For practical purposes there is no subsisting trust of the arrears. The trustees cannot claim any right of set-off. If there were any set-off it would be of a debt due to Mrs. Weston. The debt is really due to her representatives. We are not claiming in an action for debt, but are seeking to recover a specific property, and it is no answer for the trustees to say we owe a debt to some one for whom they are trustees. It cannot be said that the husband's interest in the property is a security for the performance of his covenant. The only way in which the trustees can succeed is by bringing the case within that class of authorities of which *In re Akerman* (1) is an example. The husband's interest does not arise out of the deed, but it arises because the deed has ceased to be operative, and, therefore, it cannot be impounded to make good his obligation under the covenant: *Hallett* v. *Hallett.* (2) In all the cases cited there was money in the hands of the trustees on the one hand, and a money claim by them on the other, and it was held that the one could be set off against the other; but you cannot set off money against a leasehold house. The trustees are attempting to set up a lien on a leasehold house to secure moneys due under the covenant; but where is the contract for their security? Can it be said that the lien arises from the fact that the settlement of the leasehold property and the covenant are contained in the same document? It was by no contract with the wife or the children or the trustees that the husband became entitled to these leaseholds. It is not an interest conferred on him in consideration of his covenant, but it came to him because it was his in the first instance, and there was no one else to take it. This is a voluntary settlement. There is here no covenant by the wife or by the trustees on her behalf to live apart, and there is no consideration for the husband's covenant. The principle of *Burridge* v.

(1) [1891] 3 Ch. 212. (2) (1879) 13 Ch. D. 232.

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Row (1) does not apply to a voluntary settlement. We also rely upon the Statute of Limitations.

Jenkins, Q.C., in reply. It is suggested that the husband does not take under the settlement, but takes under a resulting trust; but the existence of the express trust precludes the idea of a resulting trust. *Hallett* v. *Hallett* (2) is distinguishable, because the property there in question was expressly excluded from the settlement. The principle of *Burridge* v. *Row* (1) is that a person who claims a benefit under a deed must also perform the obligations imposed by the deed. The equity does not depend upon the nature of the property. *Woodyatt* v. *Gresley* (3), *Ex parte Mitford* (4), and *In re Hope* (5) proceed on the same principle.

[STIRLING J. referred to *Fox* v. *Buckley*. (6)]

That was the case of a legal devise, and the ground of the decision was that the estate of a legal devisee was not under the control of the Court. We say that the equity which we claim attaches even in the case of a voluntary settlement, which is perfectly good as against the parties; but we say further that this settlement is not voluntary, inasmuch as an agreement by the wife not to take proceedings for restitution must be implied from the recital in the deed: *Clark* v. *Clark*. (7)

The Statute of Limitations does not apply, since the time begins to run only from the period when the reversionary interest falls into possession: *Hugill* v. *Wilkinson*. (8)

Cur. adv. vult.

May 1. STIRLING J. This was an originating summons taken out by the sole surviving trustee of a separation deed dated September 1, 1864, made between Edward Weston of the first part, Ann Weston, his wife, of the second part, and certain trustees of the third part, for the determination of questions

(1) 1 Y. & C. Ch. 183.
(2) 13 Ch. D. 232.
(3) (1836) 8 Sim. 180; 42 R. R. 153.
(4) (1784) 1 Bro. C. C. 398.
(5) W. N. (1900) 76.
(6) (1876) 3 Ch. D. 508.
(7) (1885) 10 P. D. 188.
(8) (1888) 38 Ch. D. 480.

which have arisen as to the interests of persons claiming to be entitled to the property subject to the trusts of the indenture. [His Lordship stated the facts as above, and observed that it was conceded (1.) that the bankruptcy of the husband did not free him from his future obligations under the covenant, and (2.) that the assignee in bankruptcy was in no better position than the husband, and he continued as follows:—]

The contention on behalf of the wife's executors is that Weston's right to the property, subject to the trusts of the deed, was equitable only, and was derived under the deed; and that he could not claim in a court of equity any benefit under the deed without fulfilling his obligations under the same instrument, one of which is to pay what is due under his covenant.

Assuming for the moment that the title of Weston is derived under the deed, I shall first consider whether the rest of the contention is well founded.

In *Priddy* v. *Rose* (1), by a settlement made on the marriage of Mr. and Mrs. Hunt, two sums of money, the property of the wife, were assigned to trustees; the husband covenanted with the same trustees to pay to them a sum of 4000*l*. Under the trusts the husband took a first life interest both in his wife's property and in the investments of the 4000*l*. The husband afterwards absconded without having paid the 4000*l*. in accordance with the covenant. It was held that the trustees were entitled to retain the income of the wife's property towards satisfaction of the covenant. Sir William Grant M.R. says (2): "I apprehend it to be clear that he" (Hunt) "could not have claimed a benefit under the settlement without making good his part of it." In that case the fund of which the income was impounded was derived from the wife; the defaulter was the husband. In *Smith* v. *Smith* (3) the husband, in contemplation of marriage, executed in favour of the trustees of his marriage settlement a bond, and also a mortgage of real estate by way of security for 15,000*l*., to be held upon trusts, under which he took the first life interest. He failed to pay the

(1) (1817) 3 Mer. 86; 17 R. R. 24. (2) 3 Mer. 104.
(3) (1835) 1 Y. & C. Ex. 338.

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15,000*l.* in accordance with the bond. The mortgage was realized, and produced less than 15,000*l.* It was held that the trustees were entitled to retain the income arising from the investment of the purchase-money until the whole of the 15,000*l.* should be made good.

Burridge v. *Row* (1) was also a case of a marriage settlement. The trust property consisted of two sums of 5000*l.*, one secured by the covenant of the husband and policies of assurance on his life, the other by the bond of the father-in-law. The trusts of the former were for the wife for life, with remainder to the husband for life with an ultimate remainder in default of children of the marriage (which event happened) for the husband, his executors, administrators, and assigns. The husband became bankrupt, and the father-in-law purchased the husband's interest in the 5000*l.* coming from his son-in-law, and afterwards himself became bankrupt. It was held that the assignee in the bankruptcy of the father-in-law could not take any interest in the fund which had arisen from the policies brought into settlement by the husband without satisfying what was due under the father-in-law's bond. Knight Bruce V.-C. there said (2): "Having regard to the rights and liabilities of the parties immediately before the bankruptcy of Winchester" (the father-in-law), "I think there is a right on the part of the plaintiffs to say, that the interest belonging to Row's estate, which Mr. Winchester had purchased, shall not be taken from them without making good Winchester's obligations; although the liability does not stand exactly on the same footing as in the three cases of *Priddy* v. *Rose* (3), *Woodyatt* v. *Gresley* (4), and *Smith* v. *Smith* (5), I view the policy fund as standing rightly in the names of the trustees now before the Court. If Winchester had not become bankrupt, and after his death his executors had applied to the trustees for a transfer of the policy fund and interest on the policies, the trustees would have had a right to say, 'True, we owe you this, but you owe us a sum on your bond; therefore, let an

(1) 1 Y. & C. Ch. 183.
(2) Ibid. 192.
(3) 3 Mer. 86; 17 R. R. 24.
(4) 8 Sim. 180; 42 R. R. 153.
(5) 1 Y. & C. Ex. 338.

account be stated between us.' If that were the state of the rights of the parties at that time, the bankruptcy of Winchester would make no difference; but, according to the extensive meaning which has been applied by the authorities to that expression, there was a mutual credit between the parties. There was a right of retainer, set-off, or lien—call it what you will—in favour of the plaintiffs against Winchester's estate. I am not, however, prepared to say that I can give effect to that lien now; but it may be convenient that I should declare it, for then the effect of it may be obtained in Mrs. Burridge's lifetime; inasmuch as the assignees of Mr. Winchester may think fit to sell the reversionary interest in the policies; and if they take that course, they must do so subject to that right which I think I am justified in now declaring to be in the plaintiffs." And he made a declaration accordingly. [His Lordship read the declaration.] That declaration gives effect to the right as stated in the part of the judgment which I have read; viz., a right to say that the interest under the settlement should not be taken from the trustees without making good the liability thereunder.

Those authorities have been followed in many cases, among which I may mention one in the Court of Appeal in Ireland, *Corr* v. *Corr* (1), again a case of a marriage settlement, where Michael Corr, the husband, conveyed leaseholds to the trustees and executed in their favour a bond for 2000*l*., being the amount of the wife's fortune which he had received. Under the trusts he took a first life interest. After the marriage he became bankrupt. It was held that the trustees were as against the assignees in bankruptcy of the husband entitled to retain the income of the leaseholds until the amount of the debt due to them on the bond was made good. Fitz-Gibbon L.J. there says (2): "The bond and judgment have not been fully raised, and the sum of 1807*l*. 1*s*. 3*d*. now in court represents the corpus of the husband's settled lands. We must treat this fund as subject to the same liabilities which would affect the lands if still unsold. As against the bankrupt and all persons claiming through him, the legal ownership of

(1) (1879) 3 L. R. Ir. 435. (2) 3 L. R. Ir. 447.

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these lands would be in the trustees, who alone could give valid receipts for the rents or produce of them. I do not see how Michael Corr or his assignees could compel the trustees to pay over one shilling of the rents if they had been received by virtue of the legal ownership upon trust for Michael Corr, as long as the debt upon the bond remained unsatisfied. The trustees are now entitled to receive the money which represents the lands, and while bound to hold the corpus upon the trusts of the settlement may, as it seems to us, stop the interest otherwise payable to Michael Corr, and set it off against or apply it in discharge of his debt due to them. His life interest in the rents and profits of the settled lands, of which he was but the equitable owner, could never have reached his hands except through the trustees; and *Priddy* v. *Rose* (1) and *Burridge* v. *Row* (2) are but applications of the principle that trustees, before making any payment out of the trust funds to a cestui que trust who is indebted to them as trustees, may discharge the amount so due, and authorities that this right will prevail against assignees." The Lord Justice there points out the two elements of the right of the trustees to be—(1.) that the person against whom it is asserted should be a cestui que trust; (2.) that he should be indebted to them as trustees.

These elements exist in the present case; but various reasons were urged why the right claimed by the trustees should not have effect given to it.

In the first place it was said that, whereas these cases were all decided upon marriage settlements, the separation deed here in question contained no covenant by or on behalf of the wife and must be treated as voluntary. On this I may remark that it is nowhere laid down that the right does not exist in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the Court. It exists in the case of interests arising under a will, provided these are equitable and not legal: see *Fox* v. *Buckley*. (3) It extends even to legal estates, provided the right arises by virtue of a contract contained in the instrument creating the legal estate or another

(1) 3 Mer. 86; 17 R. R. 24. (2) 1 Y. & C. Ch. 183.
(3) 3 Ch. D. 508.

instrument forming part of the same transaction: see *Woodyatt* v. *Gresley* (1); *Fox* v. *Buckley*. (2) It is not, however, necessary to express a concluded opinion on this point, because, in my judgment, the separation deed was not voluntary. It contains a recital that the husband and wife had agreed to live separate, and that recital is evidence of such an agreement. By such an agreement a married woman can bind herself: see *Besant* v. *Wood* (3); *Clark* v. *Clark* (4); *Aldridge* v. *Aldridge*. (5) The husband and wife did from the execution of the deed, live apart; and consequently the husband received the full consideration for the assignment and covenant on his part contained in the deed. He cannot be heard to say that the deed was not executed for value. It was, however, urged that in *Woodyatt* v. *Gresley* (1), and also in most, if not all, of the cases on marriage settlements, property was brought into settlement on the part of the wife; and it was argued that this was necessary. I fail to see why this should be so. If it is once made out that the deed is given for valuable consideration the quantum of it is immaterial: see *Gravely* v. *Barnard*. (6) It was also urged that the right only applied where there was a fund in the hands of the trustees on the one hand and a debt due to them on the other. In this case the leaseholds ought to be converted on the death of the widow, so that under the settlement there would be a money fund in the hands of the trustees. It was said that in the events which happened Edward Weston had become the sole owner in equity, and was entitled to require the trustees to convey to him. No doubt he might elect to take the property in specie, so long as he did not thereby derogate from the rights of others; but I apprehend that a court of equity would not allow him so to elect to the prejudice of another cestui que trust under the same instrument. In truth, however, the right in its strictest form appears to me to be wider than is admitted by the assignee in bankruptcy: it is that a person entitled to property legally vested in trustees cannot compel those trustees to hand over

(1) 8 Sim. 180; 42 R. R. 153.
(2) 3 Ch. D. 508.
(3) (1879) 12 Ch. D. 605.
(4) 10 P. D. 188.
(5) (1888) 13 P. D. 210.
(6) (1874) L. R. 18 Eq. 518.

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the property to him until he has satisfied a debt due to those trustees and arising under the instrument which creates the trust. This is shewn by the form of the orders made in *Burridge* v. *Row* (1) and *Corr* v. *Corr.* (2)

It was, however, contended that, though Edward Weston's title was equitable, he did not derive it under the separation deed, and for this *Hallett* v. *Hallett* (3) was relied on. In that case a policy of assurance on the life of Henry Hughes Hallett was taken in the names of the trustees of his marriage settlement. By the settlement the trustees were to stand possessed of the policy and the sum thereby assured, and also a sum of Consols upon trust for himself for life, and, after the death of either him or his wife, upon trust for the survivor for life, and then upon trust for the children; and the settlement contained a declaration that nothing therein contained should be construed to vest in the trustees any bonus, accumulation, or addition which might from time to time be declared on the policy of assurance, but that the same should from time to time be paid to Henry Hughes Hallett, his executors or administrators, for his or their own use and benefit, to be applied as he or they might direct. H. H. Hallett misappropriated a portion of the trust funds. The trustees claimed to retain a sum received by them on the death of H. H. Hallett in respect of bonuses to make good the loss to the trust funds. The plaintiff, the widow, claimed the sum as his executrix. Fry J. said (4): "The trustees say that H. H. Hallett was under a liability to them under the same settlement by virtue of the trusts of which the claim of the plaintiff as his personal representative is made; and there is no doubt that if this claim by Mrs. Hallett was really made against the defendants as trustees of the settlement, then the amount might be properly retained in satisfaction of their claim as trustees against his estate." That is an authority in favour of the view which I have taken. Then he goes on: "The question, therefore, comes to this, does she or does she not claim this sum as part of the trust fund included in the settlement? I think she does not, for before the execu-

(1) 1 Y. & C. Ch. 183.
(2) 3 L. R. Ir. 435.
(3) 13 Ch. D. 232.
(4) Ibid. 234.

tion of the settlement the defendants held the policy and its fruits on a resulting trust for H. H. Hallett, and everything accruing to him by virtue of the policy would have been his if there had been no settlement. He then settled the policy, but specially provided that nothing in the settlement should vest in the trustees any bonus." That case is entirely distinguishable from the present. The bonuses there in question were in terms excluded from the operation of the deed. Here the deed contains an express trust in favour of Edward Weston. The settlor, having executed the deed, could not in my opinion disclaim the benefits under it: see *Standing* v. *Bowring* (1); and the express trust in his favour excludes any implied or resulting trust. This appears to be in accordance with the decision in *Burridge* v. *Row*. (2) In my judgment, therefore, the trustee is entitled to retain the trust property until the arrears due under the covenant are satisfied.

Declare that the trustee of the indenture of September 1, 1864, is entitled as against the defendant, Herbert Kelly, as the assignee in bankruptcy of the late Edward Weston, to retain the property now subject to the trusts of the said indenture until the amount payable to the said trustee under the covenant of the said Edward Weston therein contained shall be satisfied; and that the defendant, the said assignee, without making good such amount, is not entitled to claim the said property or any part thereof.

Solicitors: *Poole & Robinson; Surtees & Surtees.*

(1) (1885) 31 Ch. D. 282. (2) 1 Y. & C. Ch. 183.

H. B. H.

KEKEWICH J.

1900

March 22.

In re LEWIS.
LEWIS *v.* SMITH.

[1900 L. 353.]

Revenue—Estate Duty—Settlement Estate Duty—Incidence—Express Provision to the Contrary—"All Duties payable by Law out of my Estate"—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1 (*a*); *Finance Act*, 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

A testatrix, who died in 1899, after giving a specific legacy on trust by way of settlement, directed that her debts, funeral and testamentary expenses, "including all duties payable by law" out of her estate, and including the duties on certain annuities given by her will, and on all legacies bequeathed by her duty free, should be paid out of funds which she designated. She then directed certain legacies to be paid out of these funds free of duty:—

Held, that the special direction in the will for payment of duties payable by law out of the testatrix's estate referred to duties which by law were payable out of the general residuary estate of the testatrix, and not to duties which by law were made payable out of specific property, and that therefore the direction did not amount to such an express provision as was required by s. 19 of the Finance Act, 1896, in order to make the settlement estate duty payable otherwise than out of the settled legacy:

Held, accordingly, that the settlement estate duty payable in respect of the settled legacy must be paid thereout.

THIS was an originating summons by the executor of the will of the testatrix, Teresa Lewis, for the determination of the question how the settlement estate duty leviable in respect of a legacy settled by the will ought to be borne.

The testatrix, who died on September 2, 1899, by her will dated February 11, 1896, gave the moneys and investments which at her death represented the funds comprised in her marriage settlement, and which in the events which had happened were held upon trust for her, her executors, administrators, and assigns, absolutely, to trustees upon trust out of the income thereof to pay free of duty certain annuities, and subject thereto to pay the said income to two persons successively during their lives, and, subject as aforesaid, she gave the settlement trust funds upon certain trusts for the benefit of the Idsworth settled estates in her will mentioned. Then, after

reciting that in addition to her settlement trust funds she was also possessed of a sum of 3271*l.* 6*s.* 8*d.* 2¾ per cent. Consols, and that there would also be a certain balance at her bankers at the time of her decease, she directed (in clause 9 of her will) as follows: "My debts and funeral and testamentary expenses, including all duties payable by law out of my estate, and including the duties on the annuities hereinbefore charged on the income of my said settlement trust funds, and all the duties on any other annuities and on all legacies hereby or by any codicil hereto bequeathed duty free shall first be paid thereout, and subject as aforesaid I direct that the following legacies shall be paid thereout all free of duty. . . . ." She then gave certain legacies, and gave the residue of the 3271*l.* 6*s.* 8*d.* Consols and of the bank balance to her niece, Muriel Newcomen, absolutely, and she gave all her real estate and the residue of her personal estate to H. Le Roy Lewis, whom she appointed her executor.

The funds comprised in the marriage settlement were represented by a sum of 9907*l.* 3*s.* 2*d.* Consols, and the Crown claimed settlement estate duty on that sum under s. 5 of the Finance Act, 1894. The question was whether this duty ought to be paid out of the settled fund itself in exoneration of the rest of the estate of the testatrix, or out of the 3271*l.* 6*s.* 8*d.* Consols and the bank balance.

Howard Wright, for the plaintiff. Under s. 19 of the Finance Act, 1896 (1), the settlement estate duty will be payable out of the settled legacy "unless the will contains an express provision to the contrary," and the question is whether the will contains any such provision.

Warlters Horne, for the trustees of the settled legacy. The will speaks of "all duties." That would cover settlement estate duty, which is a form of estate duty. In s. 5 of the Act of 1894 it is called a "further estate duty." The will,

(1) Sect. 19 of the Finance Act, 1896 (59 & 60 Vict. c. 28), provides as follows: "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

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therefore, contains an express provision that that duty, amongst others, is to be paid out of the fund which the testatrix has provided for the purpose, and the settled legacy is exempted.

That would be so, even if it should be said that the word "estate" means primarily general or residuary estate. This is a duty which the executor would have to pay. The principle on which *In re Webber* (1) was decided was recognised by the Legislature in the Act of 1896.

[KEKEWICH J. The Court of Appeal thought not: *In re Maryon-Wilson.* (2)]

[*Attorney-General* v. *Clarkson* (3) was also referred to.]

Austen-Cartmell, for Miss Newcomen. The settlement estate duty ought to be paid out of the settled fund, and not out of Miss Newcomen's fund. The testatrix contrasts duties of two classes—those payable by law out of her estate, i.e., those payable by reason of death simpliciter, and those duties which are payable by reason of something else, namely, the disposition which she has made, such as legacy duties, and she directs the legacy duty on legacies given free of duty to be paid out of this fund. That does not apply in the case of the specific settled legacy.

Until *In re Maryon-Wilson* (2) it was thought that settlement estate duty was merely an addition to and part of the estate duty; but it was held in that case, overruling *In re Webber* (1), that settlement estate duty, whether the settlement is by the will or by some other disposition, is payable out of the settled property. The settlement estate duty is not payable until the legacy is put aside and allocated; so it cannot be said to be payable by law out of the testator's estate. When it is payable, the legacy is no longer part of the estate.

Warlters Horne, in reply.

KEKEWICH J. This testatrix has, by her will, settled personal property, and the result is that the settlement estate duty leviable in respect of that personal property which was hers to do as she pleased with must be payable out of that

(1) [1896] 1 Ch. 914. (2) [1900] 1 Ch. 565.
(3) [1900] 1 Q. B. 156.

settled property in exoneration of the rest of the deceased's estate (that is what we generally call the residue), unless the will contains an express provision to the contrary. Therefore, the question is whether this testatrix has expressed a provision to the contrary. That depends, of course, upon the construction of the will. It matters very little whether she had a power of appointment over the fund which she settled or not, for, as a matter of fact, that fund was, as I have said, her own to deal with as she pleased. She dealt with it by her will, and she directed the trustees to pay certain annuities thereout, and to pay them free of duty. It was apparently assumed in argument that that meant that the duty which otherwise would have been payable by the annuitants was to be paid out of the settled fund. I do not myself see that at all. I do not see how giving an annuity free of duty is an intimation or an expression of the will of the testatrix that that duty should be paid out of the fund of which she is disposing. Supposing it were a legacy, or an annuity standing alone not given out of the settled fund, but simply a bequest of 100*l.*, or an annuity of 100*l.* free of duty, the duty would be payable out of the residuary estate, or, as Mr. Cartmell said, as one of the testamentary expenses. The executor would have to account to the Crown, and he would not be able to make a deduction from the legacy or annuity, and the result would be he would have to bring it into the general account of the estate. Why should any different course be followed when the testatrix is dealing with a settled fund in this way? I cannot myself see here any direction that these duties should be paid out of the settled fund. I have not heard whether she has exhausted the settled fund or not, but it matters not. All she says is that the annuitants shall not pay it. She has not said that the settled fund shall pay it; and the result, it seems to me, is that, if it rested there, the duty would have to be paid out of her general estate.

We then go on to clause 9 of her will, which contains a very carefully framed and specific direction as to the duties which are to be paid out of the fund there dealt with. I do not follow Mr. Cartmell there. I do not think he is right in the

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construction of this clause as dividing the duties into two classes. I think there is only one class in which the testatrix has thought fit by express direction to include all other duties which she has mentioned, and which might or might not have been included unless she directed them to be included. She says, "My debts and funeral and testamentary expenses, including all duties payable by law out of my estate," are to be paid out of this fund. Some day we may have to consider how far duties are to be treated as testamentary expenses in the absence of any such direction; but she says clearly, "All duties payable by law out of my estate" are to be included and paid in this way. Then she goes on to enumerate some duties which are to be paid—"the duties on the annuities hereinbefore charged on the income of my said settlement trust funds"—which, as I have already said, would have had to be paid out of her residuary estate if she had not said so—"and all the duties on any other annuities and on all legacies hereby or by any codicil hereto bequeathed duty free." Those duties also would have had to be paid out of the general estate, and the only reason for mentioning them here is to remove any question, if it occurred to the executor or to those advising him, as to what duties ought to be thus paid. They are all included in the general phrase "debts and funeral and testamentary expenses." She says, "By testamentary expenses I mean to include all these." I do not think she classifies them. It is only a means of enumerating what is to be treated as falling under that head.

What, then, is the meaning of "all the duties payable by law out of my estate"? The duties on the annuities no doubt would be paid as coming within that category by the express provision in the will, but the question is whether the "duties payable by law out of my estate" would include the duty payable in respect of this settled legacy. "The duties payable by law out of my estate" mean (according to our ordinary phraseology) the duties which are thrown upon the residuary estate. "Debts and funeral and testamentary expenses" are for the purpose of this will to include these particular duties. The law has said that settlement estate duty shall be payable

out of the settled legacy. Those are the words of the Act with which we are dealing. How can I, therefore, under those circumstances, read the will as referring to that particular duty as a duty payable out of the general estate? It is not by law so payable, but is payable out of something else. It is payable out of the settled fund. Therefore, far from expressing a provision to the contrary, the testatrix seems to me in language (and I can only treat the language as it is) to say that that duty is to be left to be payable out of the settled fund. That seems to me to be the true construction of the document. Whether the point was thought of or not is another thing. It seems to me she has given no direction to the contrary. She has left the duty to fall as the Legislature has said it shall fall.

The costs are, I think, testamentary expenses. The summons is an originating summons for the determination of a question arising in the administration without the necessity for administration. If it had been done by an administration action under the former practice the costs would have been testamentary expenses.

Solicitors: *Freshfields; Pollock & Co.*

C. C. M. D.

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April 26.

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[1900 C. 273.]

Will—Testamentary Expenses—Direction to Pay Testamentary Expenses of another Person—Costs of Administration on Intestacy—Costs of Action in Probate Division—Estate Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2.

The expression "testamentary expenses" includes the estate duty in respect of the personal property of which the testator or other person whose "testamentary expenses" are referred to was competent to dispose at his death.

A direction for the payment of "testamentary expenses" may extend to the expenses of administration under an intestacy.

A testator by his will gave his residuary estate to trustees upon trust to convert and to invest the net proceeds and pay the income to his wife during her life; and after her decease he directed his trustees, after paying his widow's funeral and "testamentary expenses" and debts, to apply his residuary estate as therein mentioned. The testator's wife survived him, and signed a document which purported to be her will. After her death the plaintiff and her brother, who were in the same relationship to the widow and were her next of kin, disputed the will, and the brother brought an action in the Probate Division to have a grant of administration to the estate of the widow made to him. The Court pronounced against the alleged will, but made no order as to costs. Letters of administration to the widow's estate were subsequently granted to the plaintiff with the assent of her brother:—

Held, that the direction for payment of the "testamentary expenses" of the testator's widow extended to (1.) the costs and expenses of the plaintiff in obtaining the letters of administration, and in connection with the administration of the estate of the widow; (2.) the costs of the brother of the action in the Probate Division; and (3.) the estate duty payable on the death of the widow in respect of her personal property.

ORIGINATING SUMMONS for the determination of certain questions arising on the will of Robert Clemow, who died on October 15, 1894.

The testator, by his will dated February 4, 1893, after giving various legacies and an annuity, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his executors and trustees upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary

expenses and debts, and the legacies given by his will, and to invest the residue as therein mentioned; and to stand possessed of his said residuary trust estate and the investments for the time being representing the same on trust to pay the income thereof to his wife, Gertrude Clemow, during her life for her sole and separate use; and from and after her decease the testator directed that his executors and trustees should, with and out of the residue, after paying his widow's funeral and testamentary expenses and debts, appropriate certain sums, and pay and apply the same as therein directed. And as to all the residue of his estate and effects not thereinbefore disposed of, the testator gave and bequeathed the same from and after the decease of his said wife unto and equally between the several persons therein mentioned.

The testator's wife, Gertrude Clemow, survived him, and died on March 18, 1899. On October 21, 1895, she had made and signed a document purporting to be her will, whereby the defendant H. W. Clemow was appointed sole executor thereof. After her death Mary Yeo and her brother Thomas Buck, who stood in the same degree of relationship to Mrs. Clemow and appeared to be her only two next of kin, entered a caveat against the probate of the alleged will. The caveat was warned, and on July 25, 1899, Buck brought an action in the Probate Division against H. W. Clemow to have a grant of administration to the estate and effects of Gertrude Clemow made to him. The action came on for hearing before Gorell Barnes J. on December 4, 1899, when the Court pronounced against the alleged will, but no order was made as to costs.

On December 27, 1899, letters of administration of the estate and effects of Gertrude Clemow were granted to Mary Yeo with the assent of Buck.

The reason why the proceedings were taken in this form was alleged to be that Mary Yeo and H. W. Clemow were the surviving executors and trustees of the will of Robert Clemow, and therefore she did not want to take an active part in the action in the Probate Division; but letters of administration were granted to her for the sake of convenience, as she resided in London, and Buck generally resided in the Isle of Wight.

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No arrangement was made between them when this was agreed upon that the costs of the action should be borne by her if she took out letters of administration. The executors of Robert Clemow had paid the funeral expenses of Gertrude Clemow and her debts, but the question arose as to what was to be included under the head of her "testamentary expenses."

Mary Yeo took out this summons for the determination of the questions whether, under the direction contained in the will of the testator, the executors and trustees of his will were bound or entitled to pay out of his residuary estate (*a*) the costs of Thomas Buck of the action in the Probate Division; (*b*) all costs properly incurred by the plaintiff in, about, and incidental to obtaining the grant of letters of administration to the estate of Gertrude Clemow; (*c*) the estate duty payable on the death of Gertrude Clemow; (*d*) the fees, costs, charges, and expenses of and in connection with the administration of the said estate, or any and which of them.

The defendants were H. W. Clemow, as co-executor and co-trustee with the plaintiff of the will of Robert Clemow, and persons who were residuary legatees under the will. The testator's widow had no real estate.

Renshaw, *Q.C.*, and *Manby*, for the plaintiff. Testamentary expenses must include the expenses attending administration. The authorities are mostly cases relating to the testamentary expenses of the testator himself, but they shew that testamentary expenses will include executorship expenses, or expenses of administration: *Harloe* v. *Harloe* (1), *Penny* v. *Penny* (2), *Sharp* v. *Lush* (3), and *In re Twigg's Estate*. (4)

The costs of the action in the Probate Division are testamentary expenses: *Major* v. *Major* (5); *In re Price* (6); *In re Pearce* (7); *Brown* v. *Burdett* (*No.* 2) (8); *In re Shaw*. (9) In *In re Prince* (10) Stirling J. seems to have thought that the costs of an executor properly incurred in the Probate Division

(1) (1875) L. R. 20 Eq. 471.
(2) (1879) 11 Ch. D. 440.
(3) (1879) 10 Ch. D. 468.
(4) [1892] 1 Ch. 579.
(5) (1854) 2 Drew. 281.
(6) (1886) 31 Ch. D. 485.
(7) (1887) 35 W. R. 358.
(8) (1883) 53 L. J. (Ch.) 56.
(9) [1894] 3 Ch. 615.
(10) [1898] 2 Ch. 225, 228.

to establish a will would be testamentary expenses. The present case is analogous to that. The action was successful. Items (*a*), (*b*), and (*d*) in the summons may, therefore, be properly allowed as testamentary expenses of the testator's widow.

The estate duty should also be allowed. That duty now takes the place of probate duty, and the duty payable on the grant of letters of administration. The payment of those duties was a condition precedent to obtaining probate, or letters of administration: Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 30. The duty must have been a testamentary or administration expense. There does not appear to be any case where the question has arisen even incidentally. It did not arise in *Sharp* v. *Lush.* (1) The duty was a payment which was always made out of the estate and always allowed. If the estate proved deficient, it was repaid upon application.

The estate duty is in the same position. The Finance Act, 1894, s. 6, sub-s. 2, imposes a direct liability on the executor or administrator to pay the estate duty on the delivery of the Inland Revenue affidavit. The moment that the amount is ascertained it becomes a Crown debt of the executor or administrator, and until it is paid probate or letters of administration cannot as a rule be obtained. It is, therefore, an expense incident to the proper performance of the duty of executor or administrator, and is a testamentary expense. There is no reasonable distinction between that and such expenses as were allowed in *Sharp* v. *Lush.* (1)

The duty is chargeable on property which does not pass to the executor as such, and duty on property of that kind may be paid by him, but it is only the payment of the duty on the property passing to him as such which is a condition precedent to obtaining probate: Finance Act, 1894, s. 6, sub-s. 2; s. 8, sub-s. 1.

The duty on the whole of the widow's estate, including property of her own, is payable out of the testator's estate. A provision of this nature ought to receive a liberal construction. The testamentary expenses are coupled with debts and funeral

(1) 10 Ch. D. 468.

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expenses, and the intention clearly was that the persons who took the widow's estate should take it exonerated from all charges.

Warrington, *Q.C.*, and *Cann*, for residuary legatees. This is not a case of a man dealing with his own testamentary expenses, but giving what is, in effect, a legacy. In that sense it is important that there are no testamentary expenses of the widow at all, as there was no testament, and the testator may very well have intended to benefit persons who took under his widow's will, the objects of her bounty, but not her next of kin taking on her intestacy. It is a question of the meaning of the words of this will, and the words used are words appropriate to a will. In *In re Twigg's Estate* (1) Chitty J. took the insertion of "testamentary expenses" in s. 6 of the Intestates' Estates Act, 1890, to be a slip, and said the expression was not strictly applicable to an intestacy.

[KEKEWICH J. referred to the definition of "testamentary" in the Century Dictionary.]

It must primâ facie relate to a will. If the expression is held to include the costs of administration, items (*b*) and (*d*) in the summons must be allowed. That could not then be resisted.

As to item (*a*), Buck's costs in the action ought not to be allowed because (1.) they are not the costs of the administratrix, but of someone else; and (2.) they are not costs payable out of the estate of the testator's widow. The judge in the Probate Division refused to allow any costs. There was a hostile issue to be dealt with, and no costs were allowed. That distinguishes the case from cases like *Major* v. *Major* (2), in which costs were ordered to be paid out of the estate. The plaintiff not having been allowed any costs out of the estate, the costs are not properly payable by the administratrix, and, even giving "testamentary expenses" the wider interpretation, these costs would not be included. *In re Prince* (3) is in favour of that view. Stirling J. said that, if the judge in the Probate Division thought the costs there proper costs to be paid out of the estate,

(1) [1892] 1 Ch. 579. (2) 2 Drew. 281.
(3) [1898] 2 Ch. 225, 228.

they might be allowed as testamentary expenses. Again, the costs are the costs of Buck, not of the administratrix. She was in no way liable to pay them. In *Major* v. *Major* (1) and *In re Price* (2) the costs were the costs of the executor himself, and they had been ordered to be paid out of the estate. In *Brown* v. *Burdett* (3), again, the costs were those of the executor, and they were payable out of the estate under a compromise. In *In re Pearce* (4) the costs were the costs of the executor. They had been ordered to be paid by his opponent, but had not been paid, and they were allowed him as part of his costs, charges, and expenses. *Harloe* v. *Harloe* (5), *Penny* v. *Penny* (6), and *Sharp* v. *Lush* (7) dealt with the costs of administration actions. In *Sharp* v. *Lush* (7) Jessel M.R. said that testamentary or executorship expenses were expenses incurred in the proper performance of the duties of executor. These costs are not payable in the proper performance of the duties of the administratrix, and are not testamentary expenses.

The order of Gorell Barnes J. was practically a refusal of costs. It was equivalent to a declaration in the Chancery Division that the Court does not think fit to make any order as to costs.

The estate duty is not a testamentary expense. It is a portion of the estate of which the Crown takes possession. The executor does not pay it to obtain probate, though under s. 6, sub-s. 2, of the Finance Act, 1894, he is obliged, as a check upon him, to pay the duty as a rule on delivery of the affidavit. Probate may be granted on an undertaking by the executor.

The duty is not included in the costs, charges, and expenses of the executor. It is carried in with them, but it would not be struck out pending a taxation of the costs. It is not an expense which the executor incurs voluntarily, but something which he has to pay to the Crown, an outside party. A debt is not a testamentary expense.

(1) 2 Drew. 281.
(2) 31 Ch. D. 485.
(3) 53 L. J. (Ch.) 56.
(4) 35 W. R. 358.
(5) L. R. 20 Eq. 471.
(6) 11 Ch. D. 440.
(7) 10 Ch. D. 468.

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R. J. Parker and *A. Moresby White*, for H. W. Clemow and two of the residuary legatees. This is a question of the construction of the will. There is no technical meaning of the expression "testamentary expenses." It only means the expenses which would be allowed to the executor on taking his accounts. Assuming that it includes the costs of administration on intestacy, the reasonable way of construing this clause would be that every expense properly payable before the debts, and the debts themselves, should be provided out of the testator's estate, and all the rest be left to be borne by the persons interested in the widow's estate. The testator's object was to free his widow's estate from prior expenses, and leave her to deal with her property. In that view, the estate duty is not a testamentary expense. The executor has to pay it, but he also has to pay legacy duty, and that could not be called a testamentary expense. Both duties are a charge on the beneficial interest. If there is no estate there is no duty. The debts and funeral expenses are deducted for the purpose of arriving at the duty. Expenses arising owing to a beneficiary being an infant or a lunatic would not be testamentary expenses within this will. It was not intended that the expression should cover all the expenses of administration down to final administration.

[KEKEWICH J. That is treating the testamentary expenses of the widow on a different footing from the testator's own. I think I must construe this clause like a clause directing debts, funeral and testamentary expenses to be paid out of a particular fund.]

In that case estate duty would not be included. When a testator deals with his own testamentary expenses he is disposing of his own estate. "Testamentary expenses" is a flexible term. A testator may for a special purpose put a different meaning on it from the usual one. A limited meaning such as suggested is the more reasonable one to give in this case.

[KEKEWICH J. I only want to hear a reply as to whether the costs which have been incurred by Buck and the estate duty can be allowed as testamentary expenses.]

Renshaw, Q.C., in reply. The question whether the costs

can be allowed under this will is not quite the same as whether they could be allowed as between the administratrix and the beneficiaries in the administration. The judge in the Probate Division did not refuse costs. He did not decide anything as to them. The alleged will had to be got out of the way before any one could proceed on the footing of an intestacy, and, as between the next of kin, it was immaterial which of them took action. Either of them might have been the plaintiff, or the administrator. Buck was instrumental in clearing the way for the grant of letters of administration, and there is no reason why the costs which he incurred should not be regarded as part of the necessary costs of the administration. If the administratrix had paid them, she would have been allowed them as between herself and the next of kin. Buck must be treated as an agent in the matter.

Estate duty is not in the same position as legacy duty. That duty is only paid when the legacy is paid. Estate duty is like probate duty: it is a payment necessarily incident to the administration.

KEKEWICH J. In this case the question as to the meaning of the expression "testamentary expenses" arises under circumstances of some novelty, the peculiarity being that the direction for the payment of the testamentary expenses is not one for the payment of the testamentary expenses of the testator himself, but of the testamentary expenses of some one else, namely, of his widow, who is also the tenant for life under his will.

The first point argued is that the expression "testamentary expenses" can have no application at all here, inasmuch as the lady, according to the decree of the Probate Court, died intestate, and there cannot be expenses of a testament where no testament existed. That is a strong etymological argument. I may dispose of it on two different grounds, either of them to my mind satisfactory. In the first place, as regards the meaning of this particular will, the testator contemplated his executors paying not only the testamentary expenses of the widow, but her funeral expenses and debts, and he obviously

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intended that what was to be distributed amongst his legatees, the objects of his bounty, was that which was left after clearing her estate, and it might have been necessary, if she had incurred many debts, to spend the whole of his estate in the payment of those debts. It seems to me to be impossible to hold that the testator intended to say, "my widow's funeral expenses and debts if she dies intestate," but "my widow's funeral and testamentary expenses and debts if she dies having left a will," or, in other words, that he has inserted the word "testamentary" to meet the case of her leaving a will, intending that no expenses connected with the administration of her estate should be borne by his estate if she did not herself leave a will. Of course I am importing, and I think I must consider the testator to have imported, into "testamentary expenses" that meaning which has been attributed to it by judicial decision. Sir George Jessel, in *Sharp* v. *Lush* (1), has said that they are expenses incident to the proper performance of the duty of an executor. The words there were "executorship expenses," but he said that testamentary expenses were the same. Reading that into this will, it would be, "after paying my widow's funeral expenses and debts, and the expenses incident to the proper performance of the duty of her executors"; and I am asked to say that would mean that, if she has no executor, but only an administrator, there are no testamentary expenses at all. That seems to me to be a strained and unnatural construction of the words of the will which I ought not to adopt if I can properly construe "testamentary" otherwise; and I think I can do so independently of the words of the will itself on general grounds.

In the first place, "testamentary expenses" has received, not a definition, but a full explanation in many cases, to two of which only I will refer—*Sharp* v. *Lush* (1), before Sir George Jessel, and *In re Prince* (2), before Stirling J., who obviously, from the words of his judgment, had before his mind at the time Sir George Jessel's judgment in *Sharp* v. *Lush*. (1) The meaning of testamentary expenses as expounded there goes beyond the expenses connected with the will. No doubt,

(1) 10 Ch. D. 468. (2) [1898] 2 Ch. 225, 228.

in the beginning of his judgment, Sir George Jessel says, "expenses incident to the proper performance of the duty of an executor," but he goes on almost immediately to refer to "administration expenses," and I do not think that one ought to consider that he meant the costs of administration where the administration is at the suit of or against the executor, and not where it is at the suit of or against the administrator. It must be borne in mind that the question can only arise in a peculiar case such as this, because where there is a will a direction to pay testamentary expenses cannot require to be construed as the words do here, not even if the executor renounces, for in that case there would be administration cum testamento annexo, and the Court would be dealing with administration expenses incident to a will, notwithstanding that there was only a grant of administration. The question was, therefore, not considered by Sir George Jessel in that case, although he speaks of administration in general terms. Reading the judgment through, I cannot see for myself that if Sir George Jessel had been asked, "Do you limit that to the case of an executor?" he would have said otherwise than "I am talking of administration by the Court, whether it is an executor or an administrator who is the party, plaintiff, or defendant." But, as I pointed out during the argument, I have the authority of a dictionary of some weight as to the meaning of "testamentary." The Century Dictionary puts as the first meaning of "testamentary," "relating or appertaining to a will or wills; also, relating to administration of the estates of deceased persons," and it quotes a passage from Blackstone: "This spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in Popish) countries all matters testamentary are under the jurisdiction of the civil magistrate." That is a recognition of what is familiar to us, that the Court of Probate is also the Court concerned with the grant of letters of administration. The word "testamentary" has ceased to have its purely etymological meaning. The existence of a testament does not seem to me now to be essential to the proper use of the word, and I think it may be equally applied to the case where there is no

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testament, but where the estate is being administered according to the law of the land. And here I may make an observation which I should be sorry to adopt as the basis of my decision, but which I think is not without use as an illustration. No one according to the law of the land really does die intestate, because, as has been often said, the law makes a will for those who die without making wills for themselves. The Statute of Distributions is practically a will.

That disposes of questions (*b*) and (*d*) in the summons. They have to be answered, but Mr. Warrington admitted that if I thought there were any testamentary expenses at all, the items mentioned in those questions would be testamentary expenses payable out of the testator's estate according to his will. I strike out the word "fees" in answering the question (*d*). I do not know exactly what was meant by it. If there are any fees which are not costs, charges, and expenses, I should say they could not properly be allowed. If there are fees which are properly costs, charges, and expenses, then the word "fees" is not wanted.

Then there is another point, and that is a very strange one, namely, whether the costs of the action in the Probate Division, which were incurred by Mr. Buck, can now be properly paid by Mrs. Yeo, or rather whether she can require them to be paid out of this testator's estate. [His Lordship stated the facts on this part of the case, observing that letters of administration might have been granted to either Mr. Buck or Mrs. Yeo, and that either or both of them might have brought the action in the Probate Division. He continued:—]

I am saying nothing now about the question between Mrs. Yeo and the next of kin, if she paid the costs. I am not concerned with the question whether she could pay them and charge them against her own estate; but the question is whether she can require the testator's estate to pay the costs of that action, she not having incurred them and not being liable for them. If Mr. Buck had got letters of administration, it seems to me clear, upon the authorities and upon my construction of this will, that he would have been entitled to those costs, and the question is whether Mrs. Yeo is entitled to have those costs

paid so as to free her own estate. To say that she is not must be founded upon the technical argument that she herself is not liable to pay them, that she did not incur the costs, and cannot really be called on to pay them if they are not paid out of this estate, there being no bargain by her to do so, but I think that the proper inference is that they were incurred for the benefit of Mrs. Clemow's estate, that is to say, for her next of kin. Whether they were incurred by one or the other seems to me immaterial. I do not think it necessary to go so far as to say that Mr. Buck acted in the matter as the agent of Mrs. Yeo. Probably the facts do not justify that; but the costs were incurred for the benefit of this estate, and Mrs. Clemow's next of kin, the persons entitled to her estate, would not have received anything unless those costs had been incurred. The will had to be got out of the way, and it seems to me it was properly got out of the way, at the expense of Mrs. Clemow's estate; that is to say, the costs were expenses in the administration of her estate—testamentary expenses of hers. I think on that ground, although I have had some doubt about it, I ought to allow Mr. Buck's costs of that litigation, as testamentary expenses of Mrs. Clemow.

I must not part with this part of the case without mentioning an argument which deserves attention, although I do not accede to it. It was said that the judge of the Probate Court in trying the case did not allow any costs out of the estate. I do not understand that he said there had been any improper litigation, any squandering of money, or any extravagance in the matter of costs, or made any remarks of that kind. If he had, of course it would have been my duty to listen to that with the greatest possible respect, and to take care that the matter was looked into here, and that I did not allow under the head of "testamentary expenses" what the judge of the Probate Court had considered costs improperly incurred. But he did not do that. What he did was to say that it was not a case in which he, in the exercise of his discretion, could allow the costs of either party out of the estate. That seems to me to leave it entirely at large for me to say whether those costs should be allowed or not. I am not considering whether the

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costs ought to be allowed out of the estate or not; I am considering whether they were testamentary expenses within the meaning of this will, and on that point the decision of the learned judge could not be of any assistance to me, because he had before him one question and I have before me quite another. He had before him the question of the costs of the litigation between the parties to that litigation. I have the question of the construction of a will which he probably never saw, and certainly did not attempt to construe. It is not amiss to call attention to one circumstance. In *In re Prince* (1) Stirling J. had to deal with a case where the judge had thought the costs ought to be allowed out of the estate, and Stirling J. thought they ought not to be treated as testamentary expenses, shewing plainly that the two things are not necessarily the same.

The remaining point (which is one of great importance) is whether estate duty is payable as part of the testamentary expenses. It may not be out of place to observe that I am dealing here only with personal estate, and therefore with the estate duty payable in respect of the personal estate only, under the direction in sub-s. 2 of s. 6 of the Finance Act, 1894. The estate duty now payable may be said to have taken the place of the probate duty. It may or may not help one to consider whether probate duty was a testamentary expense. It is an extraordinary thing that there is no authority on that point. In *Sharp* v. *Lush* (2) Sir George Jessel goes into the question of the meaning of "testamentary expenses" in a very practical way, and gives a great many instances, but, unfortunately, he is silent as regards probate duty, and for a very good reason—namely, that in the particular will in question the direction was to pay debts, bills, executorship expenses, and probate duty, so that of course there was no question there that probate duty was to be paid, not *as* a testamentary expense, but *with* the testamentary expenses, in the same category; and in no case that ever I heard of is the question of probate duty raised. I suppose that the real reason is that probate duty was always necessarily allowed to an executor, and if the estate was not, at any rate presumably, sufficient to cover the duty, no letters of

(1) [1898] 2 Ch. 225, 228. (2) 10 Ch. D. 468.

administration would ever be taken out, or will proved; therefore, in practice the point never has arisen, and may never arise in this way again.

A will could not be proved without paying the probate duty, and it was just the same with administration. The duty is called probate duty, not administration duty, which I think rather confirms my view that "testamentary expenses" includes cases of intestacy. In either case probate duty had to be paid. It was a sine qua non that it should be paid before a grant, whether of probate or of letters of administration, was obtained. It seems almost to follow, as a matter of course, that it was a testamentary expense—that is to say, an executorship expense if the executor paid it, and an administration expense if the administrator paid it. I do not see my way out of it. I am reluctant to introduce a new rule to add to "testamentary expenses," which term has been generously interpreted. But, having arrived at the conclusion that the Court could not have refused to treat probate duty as a testamentary expense, I cannot avoid saying that estate duty which takes its place is also a testamentary expense. It has to be paid, and I have here the ordinary form of the letters of administration, in which it is certified that an affidavit has been filed shewing the estate was so much, and further certified by receipts that so much has been paid for estate duty charged at a certain rate. There are cases in which the grant may be obtained on some undertaking where there are difficulties, but for all practical purposes a grant of letters of administration, or of probate, cannot be obtained without paying estate duty, any more than formerly it could have been obtained without paying probate duty. I cannot myself see the difference between the estate duty, the payment of which is a necessary incident to the obtaining of the grant, and the fee paid upon swearing the affidavit which is filed in order to prove that the person applying as next of kin is the person entitled to administration. They are costs which the executor or administrator is bound to incur in order to put himself in the position of legal personal representative. The estate duty is a large sum, and the fee upon the affidavit probably is a very small one, but they are all necessary incidents to the obtaining of the

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grant. I come to this conclusion with reluctance, for I do not know where it will lead us in some cases; but at the same time I do not see my way practically to say that this duty is not a testamentary expense. I must so hold, and the result is that the duty also will be paid out of the estate of this testator in exoneration of the estate of his widow.

Solicitors: *Boxall & Boxall; W. F. Foster; Lanfear, Tanner & Lanfear.*

C. C. M. D.

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In re MASON. OGDEN *v.* MASON.

[1898 M. 2223.]

Will—Construction—Specific Devise—Residuary Devise—Gift of "all other my Freehold Messuages and Tenements"—Restriction as to Tenure.

A testator devised his freehold shop at W. to his son, and then devised to the plaintiffs "all other my freehold messuages and tenements at W. and elsewhere." The devise to the son having failed by reason of his having attested the will:—

Held, upon the authority of *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, that the second devise was not residuary, and that the freehold shop was not included in it.

The principle of *Springett* v. *Jenings*, L. R. 6 Ch. 333, applies as well to a restriction as regards tenure as to a restriction as regards locality.

T. W. F. MASON, of Wimbledon, grocer, the testator in the action, by his will dated January 27, 1862, devised his freehold house and shop where he carried on his business at Wimbledon to his son Thomas Frederick Mason in fee simple, and he bequeathed certain legacies to his wife and his son, and "As to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever," the testator devised and bequeathed the same to his wife for life, and after her death to trustees upon trust for sale and conversion, and to invest the moneys arising from such sale as therein mentioned; and the testator declared that the trustees should stand possessed of one equal third part of such moneys upon trust to pay the income thereof

to his daughter Martha Mary Mason for life, and after her decease to pay the said share to her children as therein mentioned, and as to two other equal third parts of such moneys similar trusts were respectively declared in favour of the testator's two other daughters, Frances Dorothy Peel Mason and Sophia Louisa Mason, and their children. The testator made a codicil to his will not material to the present purpose, and he died on May 28, 1865, leaving his widow and the four children mentioned in his will him surviving. At the date of his death the testator's real property consisted of a freehold cottage, two freehold shops, and a freehold beerhouse, all in Wimbledon, and two freehold houses in Kingston-on-Thames.

The devise of the freehold house and shop to the testator's son failed by reason of his having attested the will, and it was assumed that it fell into the residue.

By an indenture dated August 31, 1865, made between the testator's widow and his three daughters of the one part, and the testator's son T. F. Mason of the other part, the parties of the first part, being desirous, as therein recited, of carrying out the testator's intention as expressed in his will, purported to release to the said T. F. Mason the freehold house and shop and other property devised and bequeathed to him by the will.

The testator's son, T. F. Mason, died in October, 1871, leaving a widow, since deceased, and one child, Thomas George Mason, having, by his will dated September 30, 1871, left all his property, including the freehold house and shop, in trust (subject to a trust in favour of his wife for life) for his son absolutely.

The testator's widow died in 1882.

Of the testator's daughters, the eldest, Martha, died unmarried in 1871, the second, Frances, married W. M. Ogden and died in 1897, leaving four children her surviving; the third, Sophia, was still living and was the wife of T. J. Arnold, by whom she had one child.

This summons was taken out by the children of Mrs. Ogden and by Mrs. Arnold and her child against Thomas George Mason and the trustees of the will to determine the question

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whether the freehold house and shop at Wimbledon purported to be specifically devised to the testator's son T. F. Mason passed under the subsequent devise of all the testator's other freehold messuages and tenements at Wimbledon aforesaid and elsewhere, or devolved upon the said T. F. Mason as the testator's heir-at-law.

Renshaw, Q.C., and *Sargant*, for the plaintiffs. We submit that the devise of "all other the freehold estate" of the testator is a residuary devise, and that therefore, under s. 25 of the Wills Act, 1837 (1 Vict. c. 26), it operated to pass the house and shop, the devise whereof to the son was avoided by his attesting the execution of the will. The word "other" is sufficient to constitute a residuary gift: *Bernard* v. *Minshull* (1); *Blight* v. *Hartnoll*. (2)

Warrington, Q.C., and *George Henderson*, for the defendant Thomas George Mason. The gift to the widow for life and after her death to the other children is specific and not residuary. In order that a devise may be a true residuary gift within the meaning of s. 25 of the Wills Act, 1837, it must be so worded that it will necessarily pass at the death of the testator all his real estate whatsoever not otherwise disposed of. *Blight* v. *Hartnoll* (2) is an authority to that effect. Here the gift is of all "other" the testator's "freehold" estates at Wimbledon or elsewhere, and if he had died entitled to copyholds they would not have passed. The devise, therefore, cannot be a true residuary devise, because conceivably there might be real estate of the testator which would not pass by it. In *Springett* v. *Jenings* (3) a devise of the rest of the testatrix's lands in certain specified parishes was held not to be residuary. *In re Brown's Trusts* (4) is to the same effect.

Again, the use of the word "other" prevents the devise from passing the excepted house and shop, and it cannot pass under the word "elsewhere," because it is situate at Wimbledon. We say, therefore, that the house passed to Thomas Frederick Mason as the heir-at-law.

(1) (1859) Joh. 276.
(2) (1883) 23 Ch. D. 218.
(3) L. R. 6 Ch. 333.
(4) (1855) 1 K. & J. 522, 528.

G. Henderson, for the trustees.

Renshaw, *Q.C.*, in reply, referred to s. 26 of the Wills Act and to *Hensman* v. *Fryer* (1) and *Lancefield* v. *Iggulden*. (2)

KEKEWICH J. When the Court rose yesterday I had a strong impression that I ought to hold this to be a good residuary devise on the ground that the Wills Act expressly provides that every will shall with reference to the real estate (I limit it to real estate) comprised in it speak and take effect as if it had been executed immediately before the death of the testator, and that, therefore, if at the date of the will the testator had nothing but freehold, and at the date of the death he had also nothing but freehold, that is to say, no copyhold, there was a sufficient devise here of all that he had in the way of land. That seemed to me to be the right conclusion, having regard to the Wills Act, and, of course, bearing in mind the 25th section, reading it in combination with the 24th.

After the adjournment of the Court I studied the only two cases which I think really bear upon this case, namely, *In re Brown's Trusts* (3), before Wood V.-C., and *Springett* v. *Jenings* (4), before the Court of Appeal, consisting of James and Mellish L.JJ. I need not comment upon *In re Brown's Trusts*. (3) There are some passages, no doubt, in it which are valuable here; but the great value of that case for the present purpose I think is that it was cited in *Springett* v. *Jenings* (4), and what fell from Wood V.-C. received the approval of the Court of Appeal in that case. When I came to study *Springett* v. *Jenings* (4) more closely I was driven from the impression I had previously formed, and on reflection I do not see my way to go back to it. I put it in that way because I confess that if I were free from authority I should have wished to hold that this was a residuary devise on the ground I have mentioned, and I think it would be giving effect to the provisions of the Legislature in the Wills Act to which I have referred; but I do not see how I can do that without departing from what I understand to be the principle of the decision of James and Mellish L.JJ.

(1) (1867) L. R. 3 Ch. 420.
(2) (1874) L. R. 10 Ch. 136.
(3) 1 K. & J. 522, 528.
(4) L. R. 6 Ch. 333.

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It was argued in that case that the restriction as to locality could not take away from the gift the character of a residuary gift; and, further, that s. 25 of the Wills Act carried out the idea of s. 24, and that, taking the will as speaking from the death, the gift must be treated as residuary. That argument, as I understand, was expressly negatived by the decision of the Court of Appeal.

No doubt, something turns there upon the word "rest," which may not be improperly compared to the use of the word "other" in this case; but I think it is impossible to read the judgments of the Lords Justices without seeing that they negatived the proposition that a restrictive gift, as regards locality, could be a residuary gift. If that is sound, it seems to me to follow that a restriction as regards tenure must make the devise also fail to be residuary. I do not see logically the difference. The principle on which the Court there seems to have proceeded was that it must be universal in order to be residuary. I at first thought that a distinction might be drawn between restriction as regards locality and restriction as regards tenure, and it is quite possible that to other minds a distinction may be drawn; but it is my duty to accept what I understand to be the decision of the Court of Appeal throughout and to apply it as well as I can.

On reflection, I think that if I were to decide now that a devise of freehold (there being no copyhold) was residuary, it would be logically inconsistent with the decision of the Court of Appeal that where there is a restriction as regards locality the gift cannot be residuary. The two things appear to me to hang together so closely, that I do not see my way to deciding according to my first impression without deciding against the principle of that authority. The cases cited by Mr. Renshaw in reply do not seem to me to throw much light upon the question. Nor does the 26th section of the Wills Act seem to me to throw much light upon it. The question I have to consider is whether, according to the law and the words of the will and the authorities, there is what Mellish L.J. calls "a real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of." This particular will is not so worded as to apply to all land not otherwise disposed

of, if the testator had or might have had between the date of his will and the date of his death any copyholds. I cannot persuade myself that if the Lords Justices had had this very point before them they would not on their own reasoning have been obliged also to conclude that the gift which I have to consider was not residuary.

Mellish L.J. accentuates the point again in the very concluding words of his judgment. He says that "the Legislature intended the section to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands." In the event which was contemplated by the Wills Act, it is a devise of all the residue of the testator's land, but it is not so worded.

I have not forgotten that the word "other" deserves special consideration, as the word "rest" did in *Springett* v. *Jenings* (1); but I need not dwell upon that, because I propose to decide the case simply on the ground I have mentioned—that this, according to the decision of *Springett* v. *Jenings* (1), is not a real residuary devise. Therefore the particular property which is given to the son, which he cannot take because he attested the execution of the will, is not included in the gift, "All other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere." The word "elsewhere," of course, is important, but again I need not consider that, being unable to get over the difficulty of the description of the property as "freehold."

Solicitors: *H. S. Bridge*; *H. J. Mannings.*

(1) L. R. 6 Ch. 333.

H. B. H.

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May 1, 2.

In re MARSHALL AND SALT'S CONTRACT.

Vendor and Purchaser—Unwilling Purchaser—Qualified Covenant against Assignment—Lessor's Consent—Unreasonable Refusal.

The vendor was the lessee of a public-house. The lease under which the property was held contained a covenant against assigning without the consent of the lessor, with the usual qualification as to refusal in the case of a respectable and responsible tenant.

The vendor agreed to sell the property to the purchasers, who were brewers, under an open contract. The lessor refused to give his consent to the assignment, stating that the main ground of his objection was that he desired the house to remain a free house :—

Held, upon summons taken out by the purchasers asking for a declaration that a good title had not been shewn, that the title was not one which could be forced upon an unwilling purchaser.

SUMMONS by the purchaser asking for a declaration that a marketable title to the premises contracted to be sold had not been shewn.

The subject-matter of the sale was a leasehold public-house, held under a lease dated December 31, 1896. The lease contained a covenant by the lessee "that he, the lessee, his executors or administrators, shall not assign or underlet or otherwise part with the possession of the said messuage and premises hereby demised, or any part thereof, without the written consent of the lessor, his heirs or assigns, first had and obtained; but such consent shall not be unreasonably withheld in the case of a respectable and responsible tenant."

The lease also contained a clause for re-entry in case of default in the observance and performance of any of the covenants of the lease.

The contract that was entered into between the parties was dated September 18, 1899, and was contained in the following memorandum: "I hereby agree to sell to Thomas Salt & Co., Limited, the lease of the Emscote Tavern, Emscote Road, Warwick (having eighteen years to run), from the 25th day of March last, at or for the sum of 850*l.*, subject to the said lease being approved by the purchasers' and vendor's solicitors." On the same day the purchasers paid to the vendor a sum of 85*l.*

by way of deposit. The vendor applied to the lessor for his consent to the assignment, to which he replied as follows: "I regret that I cannot comply with your request. I object to the lease being transferred to a brewery, being desirous of retaining it as a free house." In the course of the correspondence which subsequently took place the purchasers' solicitors wrote to the lessor asking him to state the ground of his refusal, and his reply to that was, "My chief reason for objecting to the assignment of the lease to your client is that I wish to keep the house as a free house."

The purchasers being unwilling to take an assignment of the lease without the lessor's consent, declined to complete, but offered to do so if the vendor would enter into a covenant to indemnify them from all actions, claims, and demands which might result from the refusal of the lessor to assent to the assignment. This, however, the vendor declined to do, whereupon this summons was taken out.

Dibdin, for the summons. The question is one of title. The vendor has not shewn a good marketable title. He cannot compel the purchasers to complete unless he obtains the consent of the lessor. It is incumbent on the vendor of a lease which contains a restriction against alienation to prove that he has obtained the lessor's consent to the assignment: *Mason* v. *Corder*. (1) If the purchasers were to complete, they would, without doubt, be liable to a lawsuit; and the Court will never force a title on a purchaser which might involve him in a lawsuit. If the vendor thought the lessor's objection unreasonable, why did he refuse to give the indemnity asked for? [He also referred to *Day* v. *Singleton* (2), *Sear* v. *House Property and Investment Society* (3), and *In re Trustees of Hollis' Hospital and Hague's Contract*. (4)]

T. Willes Chitty, for the vendor. The covenant in the lease is a qualified one. Where a lease contains a covenant similar to the one in this case, it is unnecessary to the validity of an

(1) (1816) 7 Taunt. 9; 17 R. R. 427.
(2) [1899] 2 Ch. 320.
(3) (1880) 16 Ch. D. 387.
(4) [1899] 2 Ch. 540.

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assignment to a respectable and responsible tenant that the consent of the landlord should be first obtained: *Hyde* v. *Warden*. (1) As the proposed purchasers in this case are respectable and responsible tenants, the lessor is bound to shew a good reason for withholding his consent: *Bates* v. *Donaldson*. (2) The refusal here is unfair and unreasonable, and the lessee is at liberty to assign without the lessor's consent: *Treloar* v. *Bigge*. (3) The assignment to the brewery will not result in the house being a tied house. There is, moreover, no reasonable chance of the purchaser being involved in a lawsuit if the assignment is made without the lessor's consent. [He also referred to *Spencer* v. *Topham*. (4)]

Dibdin, in reply.

BYRNE J., after stating the facts, proceeded:—The real question between the parties is whether such a title has been shewn as ought to be forced upon the purchaser. The vendor says that this is a title which in an action for specific performance would be or ought to be enforced upon the purchaser. The purchaser says, "In the face of the objection taken by the lessor, I am not bound to complete in the absence of the lessor's consent to the assignment." The vendor says the ground taken by the lessor is so unreasonable that it entitles him to assign the lease without regard to his covenant against assignment without the consent of his lessor.

What I have to consider is whether the objection taken by the lessor is so unreasonable upon the face of it that I can say there is not (to use the words of Alderson B. in *Cattell* v. *Corrall* (5)) "a reasonable decent probability of litigation" incurred by the purchaser should he complete under present circumstances.

There is much force in the argument that the objection originally alleged by the lessor—namely, that he wished to keep the house a free house—was unreasonable, because the tie is not created by the assignment to the purchaser, but could

(1) (1877) 3 Ex. D. 72.
(2) [1896] 2 Q. B. 241.
(3) (1874) L. R. 9 Ex. 151.
(4) (1856) 22 Beav. 573.
(5) (1840) 4 Y. & C. Ex. 228, 237.

only be created by something done subsequently by the purchaser; and that there being this covenant in the lease in the event of an attempted assignment for the purpose of tying the house, the landlord could then raise the question and say, "The purchaser has taken with notice of the covenant in the lease." That is not quite all. The main reason the lessor gives for refusing his consent is that he wishes to keep the house as a free house; but I do not understand him as saying, "I have no other reason."

It is urged that, suppose litigation were to ensue, it would be at least extremely difficult for him to allege any other reason than the one he has already alleged; but I am not prepared to say in his absence that he would be estopped from alleging other reasons. The lessor, no doubt, has a genuine opinion that it would not be advisable that the house should be other than a free house; and he suspects, as anybody would suspect in the case of a sale of a public-house to a brewery company, that the purchasers intend, either by means of a sub-letting or by putting a manager of their own into the house, to make it other than a free house in this sense—that the person carrying on the business will obtain his beer from one source only, and will not be at liberty or likely to exercise his own judgment as to the person from whom he gets his beer.

When I get to the root of the whole question, it is this: Am I satisfied, on the mixed question of law and fact which might be raised by the lessor, should he after completion bring an action of ejectment against the purchaser, that it is so certain that he could not succeed as to make this objection one which ought not to be had regard to? I may observe that it is not without materiality that the vendor is not prepared to give an indemnity against any possible litigation. It is perfectly true the vendor is not bound to give any such indemnity, but I cannot help thinking that in a case of this kind his willingness or unwillingness to give such a covenant of indemnity has some bearing upon the question whether the objection taken is an untenable one under the circumstances.

Upon a whole review of the circumstances, and having regard to the fact that upon the authorities this summons in

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effect is asking whether or not specific performance ought to be granted, I do not consider that I ought to hold that a good title has been made out.

I therefore think there should be the same order in this case as in *In re Hargreaves and Thompson's Contract* (1), where the vendor was ordered to return the deposit with interest at 4 per cent. from the day when it was paid, and to pay the purchaser's costs of investigating the title.

Solicitors: *Bridges, Sawtell & Co., for Lowe & Auden, Burton-on-Trent; Kingsford, Dorman & Co., for Handley, Brown & Ledbrook, Warwick.*

G. M.

BYRNE J. 1900 *May* 11, 15.

In re DUKE OF RUTLAND'S SETTLED ESTATES. DUKE OF RUTLAND *v.* MARQUIS OF BRISTOL.

[1900 R. 536.]

Settled Land—Tenant for Life—Power of Leasing—Lease of Surface reserving Minerals.

Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, and also power to lease mines of coal, iron, or other materials, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.

Cockerell v. *Cholmeley*, (1830) 10 B. & C. 564, discussed and distinguished.

SUMMONS for a declaration that the applicant, the Duke of Rutland, had power under the Settled Land Acts or under the powers contained in an indenture of settlement dated June 6, 1853, to grant leases of the settled estates for building purposes reserving the minerals under the land.

Under and by virtue of the indenture of settlement above mentioned, divers manors, lands, and hereditaments in the counties of Leicester, Lincoln, Nottingham, and Derby were assured to the use of John Henry, then Duke of Rutland, and his assigns during his life, with remainder to Charles Cecil

(1) (1886) 32 Ch. D. 454.

John, afterwards Duke of Rutland, and his assigns during his life, with remainder to the use of the first and other sons of the said Charles Cecil John in tail male, with remainder to the applicant and his assigns for his life, with remainder to his eldest son, the Marquis of Granby, and his assigns for his life, with remainder to the use of the first and other sons of the Marquis of Granby in tail male, with divers remainders over.

By the settlement it was provided that it should be lawful for the then Duke of Rutland, and for his sons and grandson as and when such son or grandson should be in the actual possession of and entitled to the rents and profits of the settled premises, to limit or appoint by way of demise or lease all or any part or parts of the settled premises (except as therein mentioned) to any person or persons for any term or number of years absolute not exceeding twenty-one years, to take effect in possession and not in reversion, so as there should be reserved the best and most improved yearly rent that could be gotten; and it was also provided that it should be lawful for the person or persons for the time being empowered to make such limitation or appointment by way of demise or lease to demise or lease, for any term or number of years not exceeding ninety-nine years, all or any part or parts of the settled premises (except as therein mentioned) to any person or persons who should improve the premises to be comprised in such demise or lease by erecting and building any new house or houses, or other building, or by rebuilding, repairing, enlarging, or improving any houses, erections, or buildings for the time being standing on the premises, or any part thereof as therein mentioned; and it was further provided that it should be lawful for the person or persons for the time being empowered to make such limitation or appointment by way of demise or lease for twenty-one years to grant, let, or lease in possession to any person or persons for any term not exceeding sixty years any mines of coal, lead, tin, copper, iron, ironstone, or other materials or substances, or quarries, pit, or beds of marble, granite, slate, limestone, or other stone, clay, or earth either opened or not opened, and either with or without any messuages, buildings, lands, kilns, ovens, furnaces, or hereditaments convenient

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to be held with the same respectively, and either with or without the surface lands or any part thereof, and to grant such liberties and licences for working the mines and quarries, and at such rent and royalties as the person or persons exercising the power should think proper, such rent and royalties to be paid to the person for the time being entitled to the freehold or inheritance in possession of the settled premises.

Charles Cecil John, Duke of Rutland, died on March 4, 1888, without issue, whereupon the applicant succeeded to the dukedom, and became tenant for life in possession of the premises comprised in the settlement. The Marquis of Granby, the eldest son of the applicant, was married and had issue, a son, Lord Roos of Belvoir, who was under the limitations of the settlement the first tenant in tail.

For many years past it had been the custom for the Duke to grant building leases of the settled lands, reserving the minerals; but it appeared that in several building agreements now pending the proposed tenants declined to complete, on the ground that the Duke had no power after the decision in the case of *In re Newell and Nevill's Contract* (1) to grant building leases reserving the minerals.

This summons was accordingly taken out.

Vaughan Hawkins, in support of the summons. *In re Newell and Nevill's Contract* (1), where Kekewich J. held that the Settled Land Act, 1882, did not enable a tenant for life to lease surface land reserving the minerals, has since been overruled by the decision of the Court of Appeal in *In re Gladstone* (2), a case in which Cozens-Hardy J. felt bound to follow *In re Newell and Nevill's Contract* (1); so that now it is no longer necessary to ask for the declaration comprised in the first part of the summons. The only question is whether the tenant for life in this case has under the powers contained in the settlement power to grant building leases reserving the minerals. The powers of leasing are very large, both for building and mining purposes, and they follow the precedents contained in the leading precedent books. It would be extra-

(1) [1900] 1 Ch. 90. (2) Ante, p. 101.

ordinary if the tenant for life under those powers could not lease for building purposes the surface lands under which there are mines, and I submit that *In re Gladstone* (1) governs this case. [He also referred to *Dayrell* v. *Hoare* (2), *Buckley* v. *Howell* (3), and *Cockerell* v. *Cholmeley*. (4)]

Dighton Pollock, for the trustees of the settlement.

Cur. adv. vult.

May 15. BYRNE J. In this case a summons has been taken out asking whether under the powers contained in the Settled Land Acts and under the powers contained in the settlement of June 6, 1853, the tenant for life has power to grant leases of the settled estates for building purposes reserving the minerals under the land. As a matter of fact the summons was taken out prior to a decision of the Court of Appeal in the case of *In re Gladstone* (1), and the question, so far as it relates to the powers under the Settled Land Acts, does not now arise. The question I am asked to determine is whether the tenant for life has under the settlement power to grant leases of the description I have referred to reserving the minerals beneath the land demised.

Under the settlement there are very full powers given. [His Lordship read the powers as above set out, and continued :—] The powers are very full in terms, and probably but for a doubt suggested in the case of *In re Gladstone* (1), before it was settled in the Court of Appeal, this summons would never have been taken out, and no question would have arisen. I am of opinion it is quite clear that there is a power to grant building leases reserving minerals under the land, under such a power as is contained in this settlement.

With reference to the cases of *Dayrell* v. *Hoare* (2) and *Buckley* v. *Howell* (3), those have been dealt with by Lindley M.R. in the case of *In re Gladstone* (1), and I need add nothing more with reference to them. With regard to the case of *Cockerell* v. *Cholmeley* (4), there was in that case a power given to trustees to sell an estate with the consent of

(1) Ante, p. 101.
(2) (1840) 12 Ad. & E. 356.
(3) (1861) 29 Beav. 546.
(4) 10 B. & C. 564.

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DUKE OF RUTLAND'S SETTLED ESTATES, *In re.*

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the tenant for life. The power was to sell or lease any part either together or in parcels, and it was held that the trustees could not sell the estate exclusive of the timber growing upon it, leaving to the tenant for life power under the same deed to sell the wood and underwood at separate prices, and that the power was not well executed; but that has no relation to the present case. To decide in this case that the tenant for life had not power to lease for building purposes reserving the minerals would lead to a most extraordinary result, and one that could never have been thought of or intended by the power in the settlement. When a tenant for life comes into possession and he finds mining leases existing under a portion of the estate, is it to be said that he is not to be entitled to grant building leases if persons are willing to take them of the land under which those mines are?

The case in my opinion is quite clear, and if any authority were wanted on the point the case of *In re Gladstone* (1) affords such an authority.

I shall therefore declare that the applicant has, under the power contained in the settlement, power to grant building leases reserving the minerals under the lands leased.

Solicitors: *Eyre, Dowling & Co.*

(1) Ante, p. 101.

G. M.

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May 15, 16, 17.

[1899 B. 1956.]

Injunction—Light—Implied Easement—Mortgagee—Power of Sale—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4, 5; *s.* 19—*Third Party Procedure—Co-Defendants—Builder—Indemnity—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 55.

Though a mortgagee when selling under the statutory power of sale has not the same full power over the property as an absolute owner, he can convey the property to a purchaser with all the legal incidents accompanying the grant, and, on a sale of part of the property comprised in the mortgage, can give to the purchaser thereof an implied easement of light over the unsold portion.

In an action for an injunction against an adjoining owner and his builder to restrain an interference with light and for trespass, the builder severed in his defence from his employer and appeared separately at the trial, when an injunction was granted with costs against the defendant, the adjoining owner:—

Held, under the circumstances, that the builder was entitled to complete indemnity, and to an order for the payment of his solicitor and client costs by his co-defendant.

ACTION.

The plaintiff claimed an injunction against an adjoining owner to restrain an alleged trespass and an interference with the access of light to a small vinery; the alleged trespass and interference with light were disputed as a fact, and on this point a good deal of vivâ voce evidence was adduced; the only question argued that calls for a detailed report was raised by the defence that no implied easement of light passed under a grant by a mortgagee, exercising his power of sale, over the unsold portion of the mortgaged property. The facts, so far as material for the purposes of this report, were as follows:—

In August, 1883, hereditaments and premises in Brighton, now the property of the plaintiff and of the defendant Turner, were conveyed as a whole to one Born in fee simple. This property was subsequently mortgaged as a whole to one Stoneham.

In July, 1887, Stoneham, in exercise of his statutory power

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of sale, conveyed a portion of the mortgaged property, which included the vinery, to the predecessor in title of the plaintiff in fee simple; and in 1898 Stoneham sold and conveyed the remainder of the mortgaged property to the defendant Turner in fee simple.

In April, 1899, the defendant Turner employed one Hackman, a builder, to erect a wall and building on his land, which the plaintiff alleged encroached upon her land and would also interfere with the access of light to the vinery; the present action was thereupon commenced against Turner and Hackman, and relief was claimed against both defendants.

The defendant Hackman had severed in his defence from his employer Turner, and, being dissatisfied with the indemnity offered him by his co-defendant and with the way in which the defendant Turner, who was in a solicitor's office, was managing the defence, delivered a separate statement of defence and appeared at the trial by separate counsel; the additional costs thus incurred were made the subject of a third party application under Order XVI., r. 55, after the main issues in the action had been decided.

Rowden, Q.C., and *Peterson*, for the plaintiff. On a sale of part of a property by an absolute owner there will pass to the grantee all those apparent and continuous easements over the other part of the property which are necessary to the enjoyment of the part granted and have been hitherto used therewith: *Wheeldon* v. *Burrows*. (1) A mortgagee honestly exercising his power of sale, and selling a part of the mortgaged property, can also give the grantee all apparent and continuous easements just as an owner in fee can. As between himself and a purchaser, a mortgagee exercising his power of sale, whether statutory or expressed in his mortgage, deals with the property in the same way as an absolute owner. By the Conveyancing Act, 1881, s. 6, sub-s. 2, a conveyance to a purchaser now includes all lights or easements heretofore enjoyed: *Broomfield* v. *Williams* (2), where, as here, no contrary intention is shewn within sub-s. 4. The dicta in Wolsten-

(1879) 12 Ch. D. 31. (2) [1897] 1 Ch. 602

holme on the Conveyancing and Settled Land Acts, 8th ed. p. 70, and Robbins on Mortgages, p. 902, must be confined to the grant by a mortgagee of a new easement apart from a sale of part of the mortgaged property. An implied easement of light passed to the plaintiff's predecessor by the conveyance of July, 1887, over the then unsold portion of the mortgaged property, and the defendant when he purchased took his land subject to this easement.

Norton, Q.C., and *Boome*, for the defendant Turner. No implied easement will pass to a purchaser on a sale by a mortgagee of part of the mortgaged property. The words "or any part thereof" will not authorize a sale of trade machinery separately from the land: *In re Yates.* (1) Under a mere power mines cannot be sold separately from the surface: *Buckley* v. *Howell* (2); nor an easement granted: Wolstenholme, 8th ed. p. 70; Robbins on Mortgages, p. 902.

[*Dayrell* v. *Hoare* (3) was also referred to on this point].

This shews that a mortgagee exercising his power of sale is not in the same position as an absolute owner.

The power of sale conferred by s. 19 of the Conveyancing Act, 1881, is not so wide as that conferred by the Settled Land Act, 1882, s. 3 (i.), where the tenant for life is expressly empowered to sell "any easement" over the settled land. These two Acts were part of the same scheme, and if it had been intended that a mortgagee should grant an easement, s. 19 would have conferred this power in terms. A mortgagee, therefore, cannot grant an easement of light as against the mortgagor, or against any one but himself. The plaintiff, therefore, acquired no right to light over any portion of the unsold land.

Alexander, Q.C., and *Tindal-Robertson*, for the defendant Hackman, took no part in this portion of the argument.

Rowden, Q.C., in reply.

BYRNE J. The question of law that has been raised in this case is whether or not, by the conveyance of that portion of

(1) (1888) 38 Ch. D. 112. (2) (1861) 29 Beav. 546.
(3) (1840) 12 Ad. & E. 356.

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the mortgaged property upon which the vinery was standing, there was an implied grant of a quasi easement of light to that building over the other land then in mortgage. The Conveyancing Act of 1881, s. 6, sub-s. 2, provides that: "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all .... lights, ... easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof." That is of course subject to there being no contrary intention expressed in the conveyance as provided by sub-s. 4, and there is no contrary intention expressed in the conveyance in the present case. Then the 5th sub-section says: "This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties."

Now it is said that there are opinions in two well-known text-books, and that there is a case from which I ought to hold that there could not be a grant of a new easement over land retained by the mortgagee—that is, by an express grant. I do not think it is necessary for me to determine that question in the present case. In my opinion the mortgagee has conferred upon him by the power of sale a power when the mortgage money has become due—I am using again the words of the Act in s. 19, sub-s. 1 (i.)—"to sell or to concur with any other person in selling, the mortgaged property, or any part thereof." The first question is: May a mortgagee under this power sell a part of the mortgaged property? Clearly he can. Did the mortgagee in this case in selling the garden and vinery do more than sell a part of the mortgaged property? I think

he was selling a part of the mortgaged property, and a part which seemed, from physical circumstances, to be naturally divided from the other part. There is no suggestion of eccentricity in division, or of impropriety in the sale. The sale seems to have been within the terms of the power, and the question is what passed by the grant by the mortgagee. The mortgagee has the legal estate; his powers, however, are not the same as those possessed by an owner in fee simple. The owner in fee simple might sell the material of a house from off the property; he might dig up part of the property and sell gravel; he might partly pull down the house and sell the bricks; and he might certainly sell the trade machinery out of his trade manufactories. The mortgagee of course stands in a different position. He may not, as has been held, under the power to sell a part of the mortgaged property, sell machinery affixed to a manufactory apart from the manufactory itself: *In re Yates*. (1) I mention that case simply by way of illustration. Of course, other illustrations were given in the course of the case which would shew that the mortgagee had no power to do more than sell the whole or part of the mortgaged property. Now, I hold that this was a selling of part of the mortgaged property, and if he can sell part of the mortgaged property he can grant the mortgaged property, and he can so grant it by virtue of the power of sale which is conferred on him, and by virtue of the legal estate which he has he can so grant it as to carry with it a destruction of the equity of redemption in the part sold, and all legal incidents ordinarily accompanying a grant, as, for instance, appurtenances such as ways over the grounds of third persons, and I do not see any reason for holding that the operation of the grant is to be different from the operation of a grant by an owner in fee, so far as concerns passing apparent continuous easements. If this were not so, it might operate most injuriously to the mortgagor in many cases. I will take, for example, the case of a mortgage of a piece of property on a portion of which a house is erected with lights. A purchaser is found who is willing to give a very handsome price for that portion of the land with the

(1) 38 Ch. D. 112.

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house upon it. He is not willing to buy the adjoining property included in the mortgage. The mortgagee can, by effecting the sale of the house, get a good bargain for himself, and for the mortgagor, on the footing that the man who has bought the house has given his price because he thought he was to have a house with the proper enjoyment of light to that house. It appears to me that if a mortgagee so desiring to sell a piece of land with a house upon it could only sell it so as to confer upon the person purchasing, such an interest as would not entitle him to complain of his being built in all round, and of having all his light taken away from him, that would operate most injuriously for the mortgagor as well as for the mortgagee. My view is that the meaning and intention of the power in the mortgage is, that the mortgagee may, so long as he does not do more than sell the whole, or part of the property, grant that whole or part as the case may be with all the legal incidents attaching to a grant of the whole or part.

Under these circumstances, I have come to the conclusion in this case that the sale being of a garden, with a vinery upon it, the purchaser acquired at the same time a right to the access of light to this vinery over the land retained by the mortgagee, and that she is entitled to see that that right is not interfered with by any person subsequently acquiring the adjoining land. As a matter of fact, the adjoining land was subsequently acquired by a person also claiming under the mortgagee; but I have preferred to base my judgment on this legal point upon the broader ground that the conveyance by the mortgagee operates in the way I have mentioned. Of course, in what I have said I do not mean to suggest for one moment that the mortgagee may so deal with a mortgaged property as to infringe the rights of his mortgagor; so long as he bonâ fide sells a part of the property, I think he can sell it with the legal incidents attaching to the conveyance in granting it.

[His Lordship then reviewed the evidence as to the interference with the access of light to the vinery, with the result that he considered that the plaintiff had proved some obstruc-

tion, and he, therefore, granted an injunction against the defendant Turner with costs.]

Alexander, Q.C., and *Tindal-Robertson*, for the defendant Hackman, then asked for an order for payment of their defendant's costs as between solicitor and client by the defendant Turner, and relied on *Howard* v. *Lovegrove*. (1)

Norton, Q.C., and *Boome*, for the defendant Turner, submitted that the builder had followed an unusual and unreasonable course in severing from his co-defendant, and that, if he insisted upon employing his own solicitor and appearing separately, he ought to bear the extra costs occasioned by so doing.

BYRNE J., after considering the correspondence between the co-defendants and the evidence, held that under the circumstances of this case the builder was justified in severing from his employer in his defence, and that he had not acted unreasonably, and, as he was entitled to complete indemnity, his Lordship therefore ordered his solicitor and client costs to be paid by the co-defendant Turner.

Solicitors: *Mason, Soper & Wood; Alfred Slater; A. R. O. Lowndes, for Arthur F. Griffith, Brighton.*

(1) (1870) L. R. 6 Ex. 43.

W. C. D.

BYRNE J. 1900 *Jan.* 30, 31; *Feb.* 1, 2, 3, 6, 7, 13; *May* 24.

In re WRIGHT, CROSSLEY & CO.'S APPLICATION AND ROYAL BAKING POWDER COMPANY OF NEW YORK.

Trade-marks—Disclaimer—Old and New Marks—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 62, *sub-s.* 2; *s.* 64, *sub-s.* 2; *s.* 74—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10–16.

If application for registration of an old trade-mark has to be made under sub-s. 2 of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888, there is no distinction in reference to disclaimer between new marks and old marks.

Where, under s. 62, sub-s. 2, application is made to register a trade-mark which was used by the applicant or his predecessors in business before August 13, 1875, it is not necessary in the application to state the names of the members of the firm for the time being since the alleged first user, nor even to insert the words "and their predecessors in business, members of the firm for the time being."

THIS was an appeal against the decision dated March 8, 1898, of the Registrar of Trade Marks, whereby he directed that the registration of the trade-mark referred to in the above-named application in class 42, in respect of baking powder, should proceed.

The applicants were millers and manufacturers, carrying on business in Liverpool, who sold among other foodstuffs a baking powder which they designated as "Royal Baking Powder."

The opponents, the Royal Baking Powder Company, were incorporated in the United States of America in March, 1873, being the successors in business of a firm of Biddle & Hoagland, who had made and sold a baking powder, which, in July 1866, they described as "Royal Baking Powder," and which since that date had been sold under that designation.

In the year 1871 the "Royal Baking Powder" was first introduced into this country by the predecessors in business of the company, and since that time the company had expended large sums of money in advertising it, with the result that they had established a large and lucrative trade therein.

The trade-mark the subject of the application was not registered upon the passing of the Patents, Designs, and Trade Marks Act, 1883, but on December 18, 1896, Messrs. Wright, Crossley & Co. applied to register their pink baking powder label as an old mark.

The application was in conformity with Form F in the 1st schedule to the Act, and was as follows: "Application for registry of trade-mark." (This was a pink label having on the left-hand side a lion rampant with the words "Royal Baking Powder" wound round it, the whole surrounded with a scroll, the lower part of scroll having the words "Wright, Crossley & Co., Liverpool," intertwined in it, and on the right-hand side the directions for use in bread-making.) "You are requested to register the accompanying trade-mark in class 42 with respect to baking powder in the name of Wright, Crossley & Co., of 17, North John Street, Liverpool, millers and manufacturers, who have used the above trade-mark in respect of the said goods for upwards of thirteen years prior to August 13, 1875, and who claim to be the proprietors thereof. The essential particulars of the trade-mark are the following . . . . [not filled in] and the applicants disclaim any right to the exclusive use of the added matter . . . ."

Notice of the application duly appeared in the *Trades Marks Journal*, and on June 29, 1897, notice of opposition by the company was given, and the matter came before the registrar in February, 1898.

One of the objections made to the registration of the mark was that the application did not specify the essential particulars of the mark, and did not disclaim any right to the exclusive use of the added matter, and in those respects did not comply with the requirements of s. 62, sub-s. 2, of the Act of 1883, and the 1st schedule in the sub-section referred to; and, further, that it was not a trade-mark within the meaning of s. 64 of the Act, as it did not consist of or contain any of the essential particulars specified in that section; that the mark was not a distinctive label or ticket, since it contained nothing which by itself could be registered as a trade-mark, the words "Royal Baking Powder" being descriptive and having reference to the

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character of the goods; that the words "Wright, Crossley & Co." were not printed in any distinctive manner, and, as to the central device consisting of a lion, that an application had been made for the registration thereof in 1888, and had been refused; and, lastly, that the directions for use did not come under any of the headings of essential particulars specified in s. 64.

The company raised other objections to the registration of the trade-mark, one being that no sufficient or satisfactory evidence had been adduced by the applicants to shew that the mark was ever used prior to August 13, 1875, and that the application contained a material misrepresentation in regard to that, and also as to the persons who had used the old mark.

The registrar, in directing that the registration of the mark should proceed, held that disclaimers as to old marks were dealt with only by s. 74 of the Act, and that s. 64 did not compel an applicant for the registration of an old mark to put in any claim or disclaimer.

From this decision the company appealed.

Warmington, Q.C., and *S. Dickinson*, for the Royal Baking Powder Company. There is a misrepresentation on the application itself as to the persons who have used this old mark. Sect. 62, sub-s. 2, says: "The application must be made in the form set forth in the 1st schedule to this Act, or in such other form as may be from time to time prescribed"—that is, by orders. The 11th rule of the Rules of 1890 is this: "Where application is made to register a trade-mark which was used by the applicant or his predecessors in business before the 13th of August, 1875, the application shall contain a statement of the time during which and of the person by whom it has been so used in respect of the goods mentioned in the application." It is admitted that no member of the firm of Wright, Crossley & Co. in 1896 was a member of the firm in 1862. Now, assuming that the mark had been used from 1862 to 1886, it was necessary to state that it had been used for that period by the persons who were then members of the firm, or by the predecessors of the firm at the very least, and so accounting

for the whole time. The importance of there being no misrepresentation in these matters is insisted on in the case of *Baker* v. *Rawson*. (1)

Our next objection is that the application does not specify the essential particulars of the mark, or disclaim any right to the exclusive use of the added matter. The question depends upon the construction of s. 64 of the Act of 1883 as amended by the Act of 1888, which enacts that, "For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars." Then the essential particulars are given, including (*c*) "a distinctive device, mark, brand, heading, label, or ticket"; and sub-s. 2 provides, "There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter"; and then sub-s. 3 (ii.) provides that "any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the 13th of August, 1875, may be registered as a trade-mark under this part of this Act." It has been considered by the comptroller that this is a proviso in favour of all old marks, but we submit that it cannot be read in that way. Every mark has to consist of essential particulars. That is perfectly general, and the only limitation is one restricted to "special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark." Unless, therefore, what is submitted by the applicant is such an old mark as that it consists of what is described in sub-s. 3 (ii.), the general part of the section must apply, and we submit that this is not such an old mark as is described in that sub-section, as it is not a "special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures"; and therefore the mark is to be regulated by the law referring to

(1) (1890) 45 Ch. D. 519.

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trade-marks generally. If that is so, then this mark cannot go upon the register.

[They referred to the following cases: *In re Price's Patent Candle Co.* (1); *Orr Ewing* v. *Registrar of Trade-marks* (2); *In re Clement & Cie.'s Trade-mark* (3); *In re Smokeless Powder Company's Trade-mark* (4); *In re Bryant & May's Trade-mark* (5); *In re Bradley's Trade-mark* (6); *In re Eastman Photographic Materials Company's Trade-mark.* (7)]

Neville, Q.C., *Sebastian*, and *E. Stewart-Brown*, for Wright, Crossley & Co.

Sir R. E. Webster, A.-G., and *Ingle Joyce*, for the comptroller. The practice of the office for the last ten years has been that disclaimers cannot be insisted upon with regard to old marks, it being considered that it would be inappropriate, having regard to the words of the Act, to compel disclaimers in respect of old marks, because it is essential that the registered old mark should absolutely correspond with the old mark as used.

The whole question is governed by the words "used as a trade-mark" in s. 64, sub-s. 2, of the Act of 1883, as amended by the Act of 1888. That sub-section says, when you register a trade-mark with the essential particulars which fulfil the conditions of the Act you may add other matter, provided that you do not claim it, and that you tell people that you do not intend to claim it; the result being that a man need not register a label as a separate label, but he may register all the essential particulars, and say, "I propose to add this or that, but I do not claim it as part of my registration." Then comes the proviso in sub-s. 3 (ii.): "any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the 13th of August, 1875, may be registered as a trade-mark." It could not have been intended to alter the law which had existed from 1875, which was continued by the Act of 1883, and which was re-enacted by the Act of 1888, by applying to that proviso a

(1) (1884) 27 Ch. D. 681.
(2) (1879) 4 App. Cas. 479.
(3) [1900] 1 Ch. 114.
(4) [1892] 1 Ch. 590.
(5) (1890) 8 Rep. Pat. Cas. 69.
(6) (1892) 9 Rep. Pat. Cas. 205.
(7) (1898) 15 Rep. Pat. Cas. 476.

provision of law which was really inconsistent with it, namely, a compulsory disclaimer. A person coming to register under those Acts an old mark must register it as it was and everything that was in it in order to say, "That is the trade-mark I wish to register," and it is quite inconsistent with that, that there should be any disclaimer at all, because he cannot say, "It is not an essential part of my trade-mark," as the only thing he is allowed to register is the mark as it was used before. It is wholly inconsistent with the privilege of registering an old mark for the applicant to be able to disclaim anything.

Sect. 74 has nothing to do with the question of compulsory disclaimers at all. An old mark when it is brought as an old mark can only be registered subject to s. 74 as it was used. Therefore, the disclaimer of a non-essential particular of an old trade-mark does not apply to such a case, because everything is essential in an old mark—a mark which could not be registered as a new mark, but a mark which is claimed to be registered because it was in use before August 13, 1875.

With regard to the other objection, that there is a misrepresentation in the application as to the persons who have used the old mark, if it is the fact that the business was carried on under the name of Wright, Crossley & Co. for thirteen years prior to August 13, 1875, and continuously on from that time, and these facts were generally known, then the office would not consider that they ought to stop the application because there was not added the absolutely useless information that in the year 1862 the firm consisted of A., B. & C., and in the year 1868 of A., B. & D., and so on. In an unreported case of *In re Bryant & May's Trade-mark*, before Stirling J., his Lordship held that it was sufficient to state that the trade-mark there had been used by the applicant or his predecessors in business before August 13, 1875. No doubt the word "predecessors" does not occur in this application; but we submit that that is immaterial. On both the above points we submit that the comptroller was right in directing this application for registration to be proceeded with.

Warmington, Q.C., in reply.

Cur. adv. vult.

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May 24. BYRNE J. This is an appeal from the decision of the registrar allowing the registration of a trade-mark claimed as an old mark.

A great many objections have been taken, but I will first deal with the objection that there is a misrepresentation in the application as to the persons who have used the old mark, the alleged misrepresentation being that the request is to register in the name of Wright, Crossley & Co., "who claim to be the proprietors thereof, and who have used the above trade-mark in respect of the said goods for upwards of thirteen years before August 13, 1875," whereas, although there was a firm of Wright, Crossley & Co. carrying on business at the present address of the applicants, there have been changes in the firm, and there was not at the date of the request to register any member of the firm who was a member in the year 1862.

In support of this objection reliance was placed upon s. 62, sub-s. 2, of the Act of 1883, which provides that the application must be made in the form set forth in the schedule to the Act, or in such other form as may be from time to time prescribed. The form is prescribed by rule 11 of the Rules of 1890, which is as follows: "Where application is made to register a trade-mark which was used by the applicant or his predecessors in business before the 13th of August, 1875, the application shall contain a statement of the time during which and of the person by whom it has been so used in respect of the goods mentioned in the application."

Form F is the form given in the schedule to the rules, and is the form made use of in this case. As filled in, it complies with the marginal directions prescribed, and I do not think that it is necessary in the application to state the names of the members of the firm for the time being since the alleged first user, nor even to insert the words, "and their predecessors in business, members of the firm for the time being."

There are two issues of fact which arise for determination on the present appeal, the first being whether or not the trade-mark sought to be registered was in fact used by itself as a trade-mark in respect of baking powder prior to August 13, 1875; and the second, whether or not there was an abandon-

ment of the mark prior to the application to register. [His Lordship considered that the evidence had clearly established that the mark had been used by itself as a trade-mark prior to August 13, 1875; and, further, that there had never been any abandonment of the label to disentitle the applicants to register upon that ground. His Lordship then proceeded:—]

The further point I have to determine, and which was taken on the part of the opponents, is one of great importance and difficulty.

It is thus expressed in the appellants' case: "That the application does not specify the essential particulars of the mark, and does not disclaim any right to the exclusive use of the added matter, and in those respects does not comply with s. 62, sub-s. 2, of the Act of 1883, and the 1st schedule in the said sub-section referred to."

The validity of this objection turns upon the true meaning of the section referred to, and of s. 74 of the Act.

It is established beyond doubt by the authorities that an old mark—that is, a mark used before August 13, 1875—must be registered as a whole, and as it was actually used.

Assuming that the mark in question is one properly registrable as an old mark under s. 64, sub-s. 3 (ii.), it appears to me that there need not be a disclaimer under s. 74, sub-s. 2, because no addition to the mark as used is asked for, and therefore the obligation to state the essential particulars or to disclaim does not arise.

But I consider that the mark is not so registrable, inasmuch as s. 64, sub-s. 3 (ii.), refers only to marks consisting of a word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark—figures meaning numerals: see *Ex parte Stephens* (1)—and not to marks containing anything besides, while the mark sought to be registered contains as well as words other particulars, including the representation of a rampant lion.

That this is the true meaning to attach to the sub-section in question appears established by the decision in *Perry Davis &*

(1) (1876) 3 Ch. D. 659.

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Son v. *Harbord* (1), where Lord Herschell says (2): "Now, my Lords, it has been held, or the opinion has been expressed at all events, by five learned judges, that on the true construction of the section" (he was referring to s. 10 of the Act of 1875, which is identical so far as the sub-head in question is concerned with s. 64 of the Act of 1883) "words have not been used as a trade-mark if they have been used either in combination with other words or in combination with any device—in short, that they must be used alone as the trade-mark in order to be used as a trade-mark within the meaning of that section. No doubt has been cast upon the opinion so expressed by any learned judge, and it appears to me to be impossible to doubt that that is the true construction of the section when one reads the last clause of it in conjunction with those which immediately precede."

If this be the true view, the mark is only registrable under s. 64, sub-ss. 1 and 2, as an old mark, but in that case it must consist of or contain at least one of the essential particulars enumerated in the section.

In this case the essential particular relied upon is a distinctive label, and what is sought to be registered is and must be the whole label.

I think the label is distinctive, and to test this I may refer to what was said by Lord Cairns in the case of *Orr Ewing* v. *Registrar of Trade-marks* (3): "I cannot think the Vice-Chancellor Hall sufficiently appreciated the object and the provisions of the Act of Parliament when he said that he considered that, in each case, a device or label, registration of which is applied for, must be looked at as a whole, and that if it appears to be such as in the ordinary course of business would be distinguished from other devices or labels, it should be registered. To some extent no doubt this is true, but I apprehend the first duty cast upon the Court is to ascertain whether some one, or more than one, of the essential particulars of a trade-mark, as defined by the Act, is found to exist, so that the mark may be described with the one, or more than one,

(1) (1890) 15 App. Cas. 316. (2) 15 App. Cas. 321.
(3) 4 App. Cas. 479, 484.

essential particular or particulars which distinguish it." And also to what was said by Chitty J. in the case of *In re Bradley's Trade-mark* (1): "The argument is that though neither of the particulars is within the 64th section, the mark must be looked at as a whole; and being looked at as a whole it is brought within sub-s. (*c*)" (as a device or label) "because as a whole it is distinctive. This point was raised before Mr. Justice Pearson in *Price's Patent Candle Company's Case* (2) and without success. It is quite true that the trade-mark must be looked at as a whole, but we must find in the whole, one, at least, of the essential particulars."

The mark of the applicants does, it appears to me, contain an essential particular or essential particulars of a trade-mark as defined by the Act, inasmuch as it contains the device of a lion surrounded by a border with ornamental work outside and with a band beneath; it has also on another part the device of a scroll unfurled from a roller on which the directions for use appear. These devices as and when used as part of the trade-mark with the rest of the label appear to me to make the whole label distinctive. It complies with the condition pointed out by Lord Cairns as necessary, and as a whole it complies with the test referred to by Lord Halsbury L.C. in *Perry Davis & Son* v. *Harbord* (3) when he says, "'Distinctive' means distinguishing a particular person's goods from somebody else's goods."

Inasmuch as the proviso in s. 64, sub-s. 3 (ii.), enables old marks not containing any essential particulars as defined in the earlier part of the section, and these only, to be registered without any disclaimer, it would seem to follow, although it is a somewhat curious result, that on the true construction of the section the applicant cannot register an old mark containing the old non-essentials plus essentials without disclaiming some at least of the identical non-essentials which standing alone would, under the later sub-head, have been entitled to registration without disclaimer.

It is pointed out with great force by the learned registrar

(1) 9 Rep. Pat. Cas. 205, 207. (2) 27 Ch. D. 681.
(3) 15 App. Cas. 316, 320.

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that a geographical word cannot be an essential particular within the meaning of s. 64, sub-s. 1, and yet it may be extremely hard upon an applicant for an old mark that he should have to disclaim it because it may be a special and distinctive word, and yet there is no saving under s. 64, sub-s. 3, about special and distinctive words unless used by themselves as trade-marks.

I may put another instance: the letters K K, if constituting an old mark, may be registered without disclaimer, but the same letters if used with the device of a key cannot be so registered without disclaiming the very letters which if used alone might have been registered as an old mark.

It seems singular and anomalous, and this has made me hesitate very much before deciding as I feel compelled to do. Another thing which makes me feel reluctant is that the learned registrar points out that "The view taken by this office under competent advice up till now has been that disclaimers as to old marks are dealt with only by s. 74, and that s. 64 does not compel an applicant for an old mark to put in any claim or disclaimer. This construction at any rate avoids the possible hardship I have pointed out, and it also makes the sections not overlap but deal each with its specific object. Of course, an applicant who comes here for an old mark insisting that he is to make a claim and disclaimer under s. 64 is allowed to do so if he chooses; but, as I say, the opinion held up to the present has been that it is not incumbent upon him to do so, and, though I see the difficulty, I think it is better in this case to follow the practice as it has been settled in the office, and hold that s. 64 does not apply to this case."

Notwithstanding the considerations I have referred to, I cannot see my way to do otherwise than hold the objection good. I cannot find any ground for distinguishing in reference to disclaimer between new marks and old marks which are sought to be registered under s. 64, sub-ss. 1 and 2, and to which s. 74 does not apply.

It has been decided that the provision that the statement and disclaimer shall be contained in the application is not merely directory, and that it cannot be waived by the Court on

an appeal from the comptroller: see *In re Goodall's Trade-mark* (1) and *In re Meeus' Application* (2); and consequently I must allow the appeal. This will not prevent a fresh application to register.

As a great part of the expense of the appeal has been occasioned by the issues of fact raised which I have determined adversely to the appellants, I think that I ought, while ordering the respondents to pay the other costs of the appeal including the costs of the Attorney-General, to order the appellants to pay the costs so far as they have been increased by the issues of user or non-user before 1875 and of abandonment or non-abandonment with the usual set-off.

Solicitors: *Janson, Cobb, Pearson & Co.; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool; Solicitor to Board of Trade.*

(1) (1889) 42 Ch. D. 566. (2) [1891] 1 Ch. 41.

G. M.

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April 4, 5, 26.

In re HAYCRAFT GOLD REDUCTION AND MINING COMPANY.

[0075 of 1900.]

Company—Winding-up—Shareholder's Petition—Companies Act, 1862 (25 & 26 *Vict. c.* 89), ss. 79 *sub-s.* 5, 129 *sub-s.* 3, 145—*Directors' Meeting—Essential Formality.*

An order to wind up a company compulsorily will be made on the petition of a holder of a paid-up share, notwithstanding that an extraordinary resolution has been passed, under s. 129, sub-s. 3, of the Companies Act, 1862, to wind up voluntarily.

Fraud is a ground, but not the only ground, on which this jurisdiction is exercisable.

After a committee of investigation had reported in favour of proceedings against the directors of a company to make them liable for misfeasance, an extraordinary resolution was passed to wind up the company, and steps were taken to dissolve the company and destroy the books. The company was ordered to be wound up on the petition of a holder of a paid-up share.

An extraordinary resolution under s. 129, sub-s. 3, of the Companies Act, 1862, to wind up a company voluntarily:—

Held, ineffectual because the notices summoning the meeting had been issued by the secretary without the authority of a resolution of the directors duly assembled at a board.

THIS was a petition by three holders of paid-up shares of the above company for the compulsory winding-up of the company.

The company was incorporated in 1896 with a nominal capital of 200,000*l.* in 1*l.* shares; 95,000 shares had been issued, on which 88,000*l.* had been paid either in cash, or in respect of vendor's shares; the company was insolvent, and had no assets other than the 7000*l.* capital not paid up, and which was due from a company alleged to be insolvent.

On January 30, 1899, the second ordinary general meeting of the company was held; the chairman proposed the passing and adoption of the directors' report and accounts down to December 31, 1898. After discussion an amendment was proposed and carried, "That the directors' report and statement of accounts submitted to this meeting be not received and not adopted, and that, having regard to such report and accounts,

it is necessary to take prompt action to protect the interests of the shareholders, and that a committee consisting of three shareholders, with power to add to their number, be and is hereby formed for the purposes following" (inter alia)—"to investigate all matters and things touching the formation and promotion of the company and the carrying on of its business; to call for and obtain the production of all books, papers, and documents in the possession, custody, or power of the directors and other officers and the solicitors of the company and others relative to the affairs of the company and its promotion; to report to the shareholders as to such investigations; to obtain such legal advice and other professional assistance as it may be deemed necessary for any of the above purposes; and that the proper costs and expenses incurred by the said committee be paid by the company."

The committee made a report charging the directors with misfeasance, and recommending that steps should be taken to recover from them what they were alleged to be liable for.

A copy of the report was given to the directors, who were asked but refused to meet the committee to discuss the matter. The report was not circulated among the shareholders. On December 20, 1899, two notices were sent to the shareholders by Mr. Gordon, the secretary, purporting to be signed by him "by order of the board." One gave notice that the adjournment of the meeting of January, 1899, would be held at the Queen's Hotel, Manchester, on Friday, December 29, at 3 o'clock in the afternoon. The other gave notice of a meeting to be held at the same place on the same afternoon at 3.30 to consider, and if necessary to pass, an extraordinary resolution, "That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily, and that Mr. Robert Gordon, of St. Lawrence House, King Street, Cheapside, London, be appointed liquidator for the purpose of such winding-up."

The two meetings were held. At the former the report and accounts of the directors were adopted, and at the latter the

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extraordinary resolution of which notice had been given was passed, and Mr. Gordon, the secretary, was appointed liquidator. Mr. Gordon, the liquidator, on February 20, called a meeting of shareholders under s. 142 of the Companies Act, 1862, for March 1, to pass the final accounts of the company and to consider how the books of the company should be disposed of.

On February 27 this petition was presented.

The meeting called for March 1 was held. The liquidator submitted an account shewing that less than 5*l.* had been received and expended by him, and reported that no further assets could be got in. Resolutions were passed—"(1.) That the account submitted to this meeting and shewing the manner in which the winding-up has been conducted and the property of the company disposed of be received and adopted; (2.) That the books, accounts, and documents of the company and of the liquidator thereof be retained by the said liquidator, he undertaking not to destroy the same until after the disposal of the petition presented to wind up the company or until the order of the Court, the books, accounts, and documents not under any circumstances to be destroyed before the dissolution of the company."

The petitioners alleged that the voluntary winding-up proceedings were invalid because the notices to call the meetings of December 29, 1899, had not in fact been authorized by a resolution of the board of directors.

The provisions of the articles on this point are as follows: Under art. 56 the directors may, whenever they think fit, convene an extraordinary general meeting. By art. 97 two directors are a quorum, and by art. 101 a meeting of directors at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under these presents vested in or exercisable by the directors jointly.

The result of the evidence of the circumstances relating to the calling of the meeting was stated by his Lordship thus: "On referring to the directors' minute-book it appeared that there was no trace of any board meeting after January 20, 1899. Mr. Gordon, who gave evidence in the box, and who was the secretary of the company, admitted that in fact there was no

meeting of the board authorizing the notices for the meetings on December 29. He said, however, that he spoke through the telephone to one director, had a conversation with the chairman, in whose office he is a clerk, and wrote letters to the other directors. I have seen some of their replies, which in substance left the secretary to fix his own day. There is, however, nothing to shew that any single director was asked to approve of the resolution as proposed which involved the appointment of Mr. Gordon as liquidator."

Herbert Reed, *Q.C.*, *George Hart*, and *Nepean*, for the petitioners. It is clear that if the facts alleged in the report, or a portion of them, can be established, the directors are liable to a large extent to the company.

[COZENS-HARDY J. The facts alleged look very like the recent case decided in the House of Lords in the matter of Olympia, Limited: *Gluckstein* v. *Barnes*. (1)]

The directors cannot now be made to account, unless there is a compulsory order; if the voluntary liquidation is allowed to go on uninterruptedly, the company will be dissolved and their books destroyed. There will be no one to account to, and evidence of the misfeasance will have perished. The answer attempted to be set up to the petition is that there is an existing voluntary winding-up, and that the Court hesitates to make a compulsory order in that case where the petitioner is a holder of fully paid-up shares. We admit that a strong case must be made; the Court has clear jurisdiction to make a compulsory order, for it has done so—for instance, where fraud in passing the resolution for a voluntary winding-up is established. There ought not to be and is no hard and fast rule limiting the exercise of the jurisdiction to that case. Here the persons charged with misfeasance had preponderating influence, behind which they ought not to shelter themselves; their action in attempting to get rid of the evidence of guilt should be stopped: *In re Varieties, Limited*. (2)

Further, we say that there is no voluntary winding-up, for the meeting at which the resolution to wind up was passed was

(1) [1900] A. C. 240. (2) [1893] 2 Ch. 235.

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not summoned properly. The directors did not authorize the summoning of the meeting at a board meeting. A mere casual acquiescence in an act by the directors individually is not equivalent to the formal decision at a board, where an important matter of this sort should be gravely discussed. Moreover, the directors do not appear even individually to have assented to or authorized the terms of the notice of meeting: *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (1)

The Hon. E. C. Macnaghten, Q.C., and *Stewart-Smith*, for the company. Sect. 145 of the Companies Act, 1862, in securing the right of creditors to a compulsory order, where there is a voluntary winding-up, implies that a voluntary winding-up is a bar to a shareholder's petition. The only case where the Court will make a compulsory order in favour of a holder of a paid-up share where there is an existing voluntary winding-up is where the winding-up resolution has been passed by fraud: *In re Gold Co.* (2); *In re Varieties, Limited.* (3)

The resolution to wind up was effectual. The informality (if any) in calling the meeting was unimportant; the shareholders got notice, valid on the face of it; the dissentient shareholders were at the meeting; the directors not only approved the calling of the meeting—they ratified the notices so far as they could by holding the meeting; no complaint was made at the time, and no one can now object: *Browne* v. *La Trinidad* (4); *Collie's Claim* (5); *Southern Counties Deposit Bank* v. *Rider.* (6) There are no assets, and a compulsory order would be futile.

Herbert Reed, Q.C., in reply. To justify a compulsory order it is sufficient to shew that an investigation into the affairs of the company may produce an advantage: *In re Krasnapolsky Restaurant and Winter Garden Co.* (7)

April 26. COZENS-HARDY J. This is a petition for the compulsory winding-up of a company by holders of fully paid-up shares. It is opposed by the company and by a large body of

(1) (1867) L. R. 2 Ex. 158.
(2) (1879) 11 Ch. D. 701.
(3) [1893] 2 Ch. 235.
(4) (1887) 37 Ch. D. 1.
(5) (1871) L. R. 12 Eq. 246.
(6) (1895) 73 L. T. 374.
(7) [1892] 3 Ch. 174.

fully paid shareholders on the ground that the company is being wound up voluntarily and that this is an absolute bar to the petition ; and, alternatively, on the ground that no fraud has been proved in passing the resolution to wind up voluntarily, which, it is said, is the only state of facts which justifies the Court in making a compulsory order after a voluntary winding-up at the instance of a shareholder. The facts of the case are very peculiar. [His Lordship stated the facts, and continued :—]

No mention is made in the minutes of the report of the committee of investigation. Proxies to a very large number were held by the persons incriminated or their nominees, who were in a position to carry any resolution. Mr. Gordon, the liquidator, proceeded with most unusual rapidity to arrange for the dissolution of the company and the destruction of all its books.

Under these circumstances, the question arises whether the resolution to wind up voluntarily was validly passed. It was laid down by the Court of Exchequer in *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (1) that directors must act together as a board, and that it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum. That case turned upon the Companies Clauses Consolidation Act, 1845, but it seems to me to be equally applicable to a limited company under the Act of 1862. In *Collie's Claim* (2) Bacon V.-C. seems to have treated the decision of the Court of Exchequer as turning upon a common law rule of pleading, and, although it was not perhaps necessary to the decision of the case before him, he certainly regarded an agreement which on the face of it was signed by four directors at different dates, and not as a board, as a contract binding the company. I cannot follow the criticisms of the Vice-Chancellor, and I prefer the view of the law taken by the Court of Exchequer. My attention was, however, directed to the case of *Southern Counties Deposit Bank* v. *Rider* (3), decided by the Court of Appeal in 1895.

(1) L. R. 2 Ex. 158. (2) L. R. 12 Eq. 246.
(3) 73 L. T. 374.

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There the directors were authorized to "determine the quorum necessary for the transaction of business." In March, 1885, they resolved that three should form a quorum; in July, 1889, a meeting of two directors only was held, at which it was resolved that two directors should form a quorum at that and future meetings of the directors. From that date to January, 1895, the company had gone on with two directors acting as a quorum. It seems probable, and indeed certain, that in the course of these years acts done by two directors must have been ratified and confirmed by a board consisting of at least three directors, and it might well be held that the long course of action by the directors as a board sufficed to establish a determination by them that two should be a quorum. In January, 1895, a special resolution to wind up voluntarily was passed, and it subsequently became known that the notices summoning the meeting were ordered under the authority of a board at which two directors only were present. An application was made for a declaration that the special resolution was not validly passed and for an injunction; but Stirling J. and the Court of Appeal declined to interfere. The Master of the Rolls said there had been an irregularity; but from 1889 to 1895 the company had gone on with two directors acting as a quorum. The resolution was passed in January, 1895, and no application to the Court to declare it invalid was made until July. The Master of the Rolls evidently treated the irregularity as one which could be set right at any moment. I do not think the decision in that case can be taken as laying down any general principle which I am bound to follow; neither the case in the Court of Exchequer nor the case before Bacon V.-C. was cited. It does not touch the question whether a notice given without any kind of board meeting having been held is valid. In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding-up of the company and the appointment of a liquidator as a mere irregularity. I believe that one or more of the directors, with the deliberate purpose of screening themselves from the investigation suggested by the report of the committee, ingeniously devised and carried out a scheme

by which the chairman's clerk should be appointed liquidator and the company should be dissolved and the books destroyed at the earliest possible moment. I think the attempt has failed, and as there was, in my view, no voluntary winding-up in existence, there is no reason why I should not now make a compulsory order. I may observe that there has been no subsequent meeting of the board ratifying and confirming what was done by Mr. Gordon in the name of the board, and it is not for me to consider what might be the effect of such a ratification or confirmation of an unauthorized act.

I do not, however, wish to decide this case solely on the ground of the invalidity of the extraordinary general resolution. I shall, therefore, now assume that there is a valid voluntary winding-up. It is clear that such a voluntary winding-up is not a legal bar to the jurisdiction of the Court to make a compulsory order on the application of a shareholder. That was decided by Sir John Romilly in 1863 in *In re Fire Annihilator Co.* (1) It is true that the company was there being wound up under the Act of 1856 and not under the Act of 1862; but I do not think the difference is material. That decision was recognised by the Lords Justices in *In re Gold Co.* (2) If, therefore, the Court has jurisdiction to make the order, I cannot hold that this jurisdiction ought to be fettered in the manner suggested in argument. The existence of a voluntary winding-up is a strong reason why the Court should decline to interfere, but circumstances may justify interference. The most common instance, no doubt, is where the Court holds that the resolution to wind up voluntarily has been passed fraudulently, but that is not exhaustive. I cannot regard the resolutions which have been passed as an honest exercise of the wishes of the shareholders with regard to the winding up of the company. No plausible reason for objection on the part of a shareholder to a compulsory winding-up can be suggested. Unless I make the order, the company will be dissolved, the books will be destroyed, and the directors, promoters, and others will escape the risk of being called upon to pay large sums into the coffers of the company. If I make the

(1) (1863) 32 Beav. 561. (2) 11 Ch. D. 701.

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order, no further call can be made upon the shareholders who have paid up in full. They cannot be required to find money to prosecute the litigation which the allegations in the report invite. I am driven to the conclusion that the shareholders objecting to the order are either persons directly implicated in the charges, or persons desirous of screening those who are so implicated. I regard the whole proceedings connected with the winding-up and the attempted dissolution of the company with grave suspicion. There is nothing in the *Gold Company's Case* (1) or in any other case which prevents me, in circumstances such as these, from exercising the jurisdiction which I possess. I think it is eminently just and equitable that this company should be wound up by the Court, and such inquiry and investigation be made as is contemplated by the statute.

Solicitors: *Michael Abrahams, Sons & Co.; E. T. Hargraves.*

D. P.

COZENS-HARDY J.
1900
April 27, 28.

In re LINOTYPE COMPANY'S TRADE MARK, No. 220,858.

Trade-mark—Invented Word—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10 (*d*).

To be registered as a trade-mark, an "invented word" need not be absolutely new, or invented for the purpose.

The word "Tachytype" had been used as part of the name of a foreign company who had advertised and made communications of patented inventions in their own name in England. An English company were allowed to register the word "Tachytype" as a trade-mark.

THIS was a motion on the part of the Lanston Monotype Corporation, Limited, by direction of the Board of Trade, to decide an appeal against a decision of the Comptroller of Trade Marks, allowing registration by the Linotype Company, Limited, of the word "Tachytype" as a trade-mark in class 6 for "typographical composing and casting machines."

A company was incorporated in the State of Minnesota,

(1) 11 Ch. D. 701.

in the United States, in the year 1891, by the name of the Tachytype Manufacturing Company. Three several patents were taken out in England as communications from abroad by the Tachytype Manufacturing Company, one in 1891, for a "machine for producing printing surfaces," the second in February, 1895, for "improvements in type casting and composing machines," and the third in March, 1895, for "improvements in machines for manufacturing mechanical controllers for matrix making, linotype, type castings, and other composing machines, and in the method of making the controllers, part of the invention being applicable to justifying mechanism." The three patents were assigned to the Linotype Company in 1897.

The Tachytype Manufacturing Company had advertised their machines, but, as the judge held, had done no substantial business in England.

During the pendency of this motion the Tachytype Company executed a deed of assignment to the Linotype Company, which recited an agreement for the sale by the vendors to the purchasers of the patents and business and trade-mark or trade name of "Tachytype" of the vendors for 25,000*l.*, which had been paid when the patents were assigned. In consideration of that sum, and a further sum of 10*s.*, the Tachytype Company purported to assign to the Linotype Company, "All that the business of manufacturers and sellers of printing machinery formerly carried on by them in the City of London and elsewhere in the United Kingdom, and the goodwill thereof, together with the said trade-mark or trade name 'Tachytype,' and all other (if any) the trade-marks and trade names used by them in such business in the United Kingdom, and the sole and exclusive right to the same in connection with the manufacture or sale of printing machinery or goods of a like nature in the said United Kingdom of Great Britain and Ireland."

Thomas Terrell, Q.C., and *J. W. Gordon*, for the appellants. The only ground for registering the word "Tachytype" as a trade-mark must be that it is an invented word, or that it is

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a word not having reference to the quality or description of the goods in connection with which it is intended to be used. The word is compounded of the Greek word ταχὺς, quick, and the common English word, type. The compound naturally means a machine intended to shorten the process of printing; looking at the names of machines of this character, such as "linotype" and "monotype," it is clear that the word is descriptive: *In re Farbenfabriken Application.* (1) We admit that an "invented word" may be to some extent descriptive: *Eastman Photographic Materials Co.* v. *Comptroller-General* (2); but we submit that it must not be so obviously descriptive as "Tachytype" is.

The word is not an invented word; we have no evidence that it has been applied to the machines advertised in this country by the "Tachytype" Company: but it must have been used in America extensively as the name of a company, and in England it has been used as the name of that company for some years by their taking out patents and advertising. The applicants have taken an assignment of the business of that company; it does not lie in their mouth, therefore, to say that this company had no business and no use of the name in this country, or that the word is new, or invented for the purpose of being used as a trade-mark.

Moulton, Q.C., *Bousfield, Q.C.*, and *Sebastian*, for the respondents, were not called on.

COZENS-HARDY J. This is an appeal from the comptroller, who has allowed the registration of the word "Tachytype." The question which I have to decide is whether this is an "invented word" within the meaning of s. 64. It has been decided by the House of Lords—*Eastman Photographic Materials Co.* v. *Comptroller-General* (2)—that sub-ss. (*d*) and (*e*) are separate and distinct in this sense—that there is no justification for incorporating into sub-s. (*d*) the limitation which is found in sub-s. (*e*). There may be a perfectly good invented word, though it has some reference to the character or quality of the goods. In reading this section I do not find

(1) [1894] 1 Ch. 645. (2) [1898] A. C. 571.

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anything to support the suggestion that the applicant must be the first inventor of the word. Now it is plain that the word "Tachytype" comes within the term an "invented word." I doubt whether anybody, not being a scholar more or less, would have the faintest conception of what the word means. The man in the street, I am quite certain, would be entirely ignorant of any meaning that could be attached to it. I have had my attention called to certain dictionary words which represent the Greek ταχὺς as a prefix to certain words. All that I can say is that there has not been one single word in that list which I ever heard of before. That is a confession of ignorance which I frankly make, and, if I did not hold that "Tachytype" is in itself a word falling within the term an "invented word," I should be disregarding the observations of the Law Lords in the "Solio" case: *Eastman Photographic Materials Co.* v. *Comptroller-General.* (1) Who invented it? Certainly not the applicants. It was invented by the American Tachytype Company. They invented it. The Linotype Company, who are the applicants, have taken an assignment by purchase from the American Company of certain letters patent; they have also got, since these proceedings, leave and licence to use this name so far as the Tachytype Company are concerned, and they have got an assignment of the mark or name and of the goodwill of the business, if any, which the Tachytype Company had in this country. I have come to the conclusion that the Tachytype Company never had any business in this country, and I think that greatly assists the applicants. It was a name which, except for the purpose of a publication or two which will be found in the Patent Office Records, was absolutely unknown in this country. I cannot find anything in this statute which obliges me to say that the applicant must be the first and true inventor of this word; still less can I find anything in the statute to bind me to say that there must be no prior publication of the word within the jurisdiction. Here I am dealing with a word which substantially has never been used in this country before—a word which, in its nature, is an invented word within the meaning of

(1) [1898] A. C. 571.

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the Act, and I think it is an "invented word" capable of being registered, and none the less though it was first invented by an American company, who have, so far as they are concerned, permitted the Linotype Company to use it in this country.

For these reasons I think that the comptroller took the right view, and I must therefore dismiss the appeal with costs.

Solicitors: *Wilson, Bristows & Carpmael; Hays, Schmettau & Dunn.*

D. P.

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May 11.

GILLINGHAM *v.* BEDDOW.

[1900 G. 912.]

Partnership—Goodwill—Sale of Business—Soliciting Customers.

One of two partners bought out the other under their articles. The articles provided that the outgoing partner might set up a similar business in the neighbourhood:—

Held, that the proviso was merely declaratory, and did not authorize solicitation of old customers.

THE plaintiff and defendant had been partners in a printing business carried on at 257, Kentish Town Road, and at Portland House, 73, Basinghall Street. The partnership had expired and had become the property of the plaintiff by purchase under the following provision in the partnership articles:—

"Provided always that upon any such expiration of the partnership as aforesaid, the partner who will give the largest sum (two-thirds of which to be paid in cash, and the remaining third in three equal acceptances at four, eight, and twelve months from such date) for the goodwill and assets of the partnership, shall be entitled to have the same made over to him accordingly. Provided, further, that nothing herein contained shall prevent either partner from starting a similar business in the neighbourhood after the expiration of the partnership."

The defendant had started a similar business at Portland

House. He had sent circulars, as of right, to the customers of his late firm soliciting orders. This was a motion on the part of the plaintiff to restrain his doing so.

Eve, Q.C., and *Jessel*, for the motion. It is established by *Trego* v. *Hunt* (1), overruling *Pearson* v. *Pearson* (2), and reinstating *Labouchere* v. *Dawson* (3), that the vendor of a business, though he may set up a rival business, must not solicit his old customers. It may be said that one ground of the decision in *Pearson* v. *Pearson* (2) is not inconsistent with the actual decision on the facts in *Trego* v. *Hunt* (1), namely, that on the construction of the document before the Court in *Pearson* v. *Pearson* (2) there was an implied licence to solicit the old customers. The Law Lords in *Trego* v. *Hunt* (1) did, however, disapprove the whole of the reasons given by the judges of the Court of Appeal. In the recent cases of *Jennings* v. *Jennings* (4) and *In re David and Matthews* (5) Stirling J. and Romer J. abstained from saying that *Pearson* v. *Pearson* (2) was altogether overruled, treating it as a case that might be supported on the construction of a very special document. If that be the true view, it does not affect this case, where all that can be relied on by the outgoing partner is a provision that he may do what he might do in the absence of any provision.

Micklem, Q.C., and *H. E. Wright*, for the defendant. The facts are practically on all fours with the case of *Pearson* v. *Pearson* (2), which was decided by the Court of Appeal on two grounds. A majority of the Court held that, where a business is sold apart from any particular provision, the vendor may not only set up a similar business next door, but may also solicit the old customers; in this they overruled *Labouchere* v. *Dawson* (3), which has since been reinstated by the House of Lords in *Trego* v. *Hunt*. (1) But all the judges in the Court of Appeal held that, even if *Labouchere* v. *Dawson* (3) were good law, an express provision that the vendor might set up a similar business in the same locality implied that he might also solicit the old

(1) [1896] A. C. 7.
(2) (1884) 27 Ch. D. 145.
(3) (1872) L. R. 13 Eq. 322.
(4) [1898] 1 Ch. 378.
(5) [1899] 1 Ch. 378.

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customers. That was not touched by *Trego* v. *Hunt* (1), and Stirling J. in *Jennings* v. *Jennings* (2), and Romer J. in *In re David and Matthews* (3), distinguishing the cases before them, recognised that *Pearson* v. *Pearson* (4) was still good law on the construction of the document before the Court.

COZENS-HARDY J. (after stating the facts). The defendant has clearly solicited the customers of the old firm, and the question is whether that is an act which can lawfully be done by the defendant. I think it is not. *Trego* v. *Hunt* (1) laid down authoritatively and finally that on the sale of the goodwill of a business there is an obligation imposed upon the vendor, arising from an implied contract, or possibly from the doctrine that he must not derogate from his own grant, that although he may carry on a similar business in the same place, he must not use the name of the old firm, which is part of the goodwill, and he must not solicit the customers of the business. That, undoubtedly, is the law. The House of Lords overruled the view of the law taken by the Court of Appeal in *Pearson* v. *Pearson* (4), and adopted the view taken in *Labouchere* v. *Dawson*. (5) But it has been argued with great force by Mr. Micklem that there were two points decided in *Pearson* v. *Pearson* (4), and that the present case comes within the second point, which was not dealt with or overruled in the House of Lords. The point is this: Mr. Micklem argues that there is an express proviso here that the sale of the goodwill is not to prevent either partner from starting a similar business in the neighbourhood after the expiration of the partnership. The first observation which arises is that, if that last proviso were omitted, would there have been anything to prevent either partner from starting a similar business after the expiration of the partnership? Certainly not. *Trego* v. *Hunt* (1), which decided that the vendor could not solicit the customers of the old firm, also decided that it was too late to hold that the vendor of the goodwill could not carry on

(1) [1896] A. C. 7.
(2) [1898] 1 Ch. 378.
(3) [1899] 1 Ch. 378.
(4) 27 Ch. D. 145.
(5) L. R. 13 Eq. 322.

a business, and the same business, in the same neighbourhood. I think, therefore, that this proviso really does not do anything more than express that which would have been implied if it had not been expressed.

Then it is argued that that is inconsistent with *Pearson* v. *Pearson*. (1) [His Lordship stated the facts of *Pearson* v. *Pearson* (1), and continued :—]

On the construction of two clauses in a particular deed all three Lords Justices, whether they agreed with the doctrine of *Labouchere* v. *Dawson* (2) or not, said that in that particular case there was no ground for restraining the vendor from soliciting the customers. And it seems to me that the conclusion was inevitable. I do not think the Lords Justices laid down a rule which I ought to follow when I am dealing with a proviso which seems to me to be nothing more than an expression of that which is the doctrine of the Court in dealing with sales of partnership properties—a doctrine which was settled in *Johnson* v. *Helleley* (3) many years ago, and has ever since been followed. The view which strikes me as the true explanation of *Pearson* v. *Pearson* (1) is that which was adopted by Romer J. in *In re David and Matthews*. (4) I think I am only following *Trego* v. *Hunt* (5), and not doing anything inconsistent with that part of *Pearson* v. *Pearson* (1) which is not overruled, by granting an injunction in the terms asked.

Solicitors: *A. J. Benjamin; Radford & Frankland.*

(1) 27 Ch. D. 145.
(2) L. R. 13 Eq. 322.
(3) (1864) 2 D. J. & S. 446.
(4) [1899] 1 Ch. 386.
(5) [1896] A. C. 7.

D. P.

COZENS-HARDY J.

1900

May 2, 3, 15

SACCHARIN CORPORATION, LIMITED *v.* QUINCEY.

[1898 S. 4006.]

Patent Action—Infringement—Foreign-made Article—Evidence—Presumption—Injunction—Damages—Alternative Relief.

In an action by patentees of an article exclusively manufactured abroad, claiming an injunction and damages for the user of the patented article in England, the only evidence of infringement adduced was that of an expert, who deposed that the plaintiffs' patents related to three separate and distinct modes of producing the article in question; that it was not possible to tell, from an examination of any particular parcel, under which process it had been produced, but that it must have been produced under one or other of these three processes. The defendant called no evidence, and claimed a nonsuit:—

Held, that the plaintiffs were not entitled to any injunction, as they had not proved that any particular patent had been infringed. On the question of damages, the Court found as a fact that the plaintiffs' patents covered every possible mode of producing the patented article, and that one of these patents must therefore have been infringed, and that the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed. An inquiry was therefore directed, without mentioning any particular patent, whether any and what damages had been sustained by the plaintiffs by reason of the user by the defendant of the patented article.

Semble: It is not always essential to establish the particular alternative under which relief is claimed, provided that the rights of the plaintiff and the obligations of the defendant are identical under each of the alternatives, and that the alternatives exhaust every possible contingency and are mutually exclusive.

ACTION.

The sole issue in this action was one of infringement, but the case is noticeable in consequence of the difficulty in which the patentees were placed in proving the alleged infringement, owing to the manufacture of the patented article being carried on exclusively abroad. The facts were as follows:—

The plaintiff company was the owner of twelve patents dated in 1885, 1894, and 1895, for the manufacture of a chemical compound known as saccharin.

In October, 1898, the plaintiff company commenced this action against the defendant, alleging in their statement of claim that he had infringed and threatened to infringe these

patents, and claiming an injunction, damages or an account of profits, delivery up of all infringing compounds, and costs. The infringement relied on was the purchase by the defendant in December, 1897, and January, 1898, of 33 lbs. of saccharin from the Chemical and Drugs Company, Limited, who were then carrying on business at Manchester. The validity of the patents was admitted.

It appeared that saccharin was entirely manufactured abroad, and the plaintiff company being therefore unable to obtain inspection, or any other direct evidence of manufacture in support of their case, adduced no evidence whatever as to the place where, or the process by which, the parcel of saccharin purchased by the defendant was produced; one witness only, an expert, was called, who deposed that the twelve patents might, for the purposes of this action, be treated as only three in number, and that these three related to separate and distinct modes of producing saccharin; that it was not possible to tell from an examination of any particular parcel under which of these three processes it had been produced; that saccharin was, in and prior to 1898, manufactured on a commercial scale only on the Continent, and only under one or other of these three processes.

The defendant, who, as the Court found, was probably as ignorant as the plaintiff company of the place where or the process by which the purchased parcel was produced, called no evidence, and claimed a nonsuit on the ground that the plaintiff company had not shewn which patent right was infringed.

Moulton, Q.C., Cripps, Q.C., and *J. C. Graham*, for the plaintiff company. The evidence of this expert is sufficient, unless answered by the defendant, to establish that the saccharin purchased by the defendant was made in contravention of our rights as patentees; we prove that it must have been made under one or other of these three processes.

[COZENS-HARDY J. The parcel purchased cannot have been made under all three processes; the onus is on the plaintiffs to shew which of these three patents has been infringed before I can grant an injunction.]

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The presumption of infringement is clear; it is the duty of the defendant to shew that the parcel purchased was made under a different process: *Neilson* v. *Betts* (1); in any event we make out a case for damages, and are entitled to an inquiry as to that.

Walter and *Bucknill*, for the defendant. The plaintiff company have failed to make out their case; we claim a non-suit. This parcel may have been made under the process covered by the 1885 patent, which expired in June, 1899. If the plaintiff company had brought three separate actions in respect of the three processes, they must have proved infringement of each patent before they could get either an injunction or damages; three bad actions cannot be so combined as to form one good one.

Moulton, Q.C., in reply. We might amend our claim by suing only on the 1894 and 1895 patents. Our evidence shews that our patents cover every known process of manufacture, and we have a complete primâ facie case for an injunction.

[COZENS-HARDY J. referred to *Wing* v. *Angrave*. (2)]

That case is distinguishable. As to damages, we are entitled to an inquiry which of our patents has been infringed; the damages recoverable must be identical; therefore, on the question of damages, we are not bound to shew which patent has been infringed.

Cur. adv. vult.

May 15. COZENS-HARDY J., after stating the facts and the result of the evidence as above, continued:—The peculiarity of the case is this. If the plaintiff company had brought three separate actions in respect of their three patents, I think they must have failed in each action, for there is neither presumption nor proof that any particular patent has been infringed, and it is forcibly argued on the part of the defendant that three bad actions cannot be so combined as to form one good action.

Now as to the injunction, I think the plaintiffs' case fails. An injunction cannot be properly granted except in respect of a patent which the defendant has infringed or threatened to infringe, and only during the continuance of that patent. I

(1) (1871) L. R. 5 H. L. 1. (2) (1860) 8 H. L. C. 183.

am satisfied that the parcel of saccharin was not made under all three processes. It was made under one of the three, though I cannot tell under which of the three. It may have been made under the 1885 patent, which has now expired, and in respect of that patent no injunction could now be granted. The plaintiff company, therefore, have not established that which is necessary to entitle them to an injunction.

As to damages, there is more difficulty. Treating the pleadings as amended in order to raise the real question, the plaintiff company allege that they were in 1897 and 1898 the owners of three patents, which together gave them the sole authority within the United Kingdom to make, use, or vend saccharin; that the damages recoverable for infringement must be identical in amount, whichever of the three patents was infringed by the defendant, and that, although they cannot prove which of the three patents has been infringed, they can recover damages for infringement of one or other of the three patents, as they have proved that the defendant has infringed one or other of them.

Now, in the ordinary case of a claim for alternative relief the plaintiff has to prove at the trial under which of the alternatives pleaded he is entitled to succeed. The present plaintiffs cannot bring themselves within this principle. But I am not satisfied that under the modern practice it is always essential to establish the particular alternative, provided only that the rights of the plaintiff and the obligations of the defendant are identical under each of the alternatives, and that the alternatives exhaust every possible contingency and are mutually exclusive.

Suppose all the coal in the parish of X., lying to the east of a certain fault, is demised in 1890 by A. to B., and by a subsequent lease in 1891 all the coal in the parish lying to the west of the fault is demised by A. to B., and suppose that the rents and royalties reserved by the two leases are identical. The precise position of the fault may be unknown to both A. and B., or indeed to any living person. B. works coal within the parish in 1892. He ought not, it seems to me, to be able to refuse to pay any royalty unless A. can shew whether the coal has been got from the east or from the west of the fault, or whether his right depends upon the lease of 1890 or upon the lease of 1891.

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The coal must have been got from one side or the other of the fault, and the amount payable for royalty will be the same in either case. Common sense requires that A. should be entitled to sue alternatively either under the first lease or under the second lease. In the case supposed, the two alternatives exhaust every possible event, and, that being so, I think A. ought to recover.

The present case, though not turning upon contract, ought I think to be dealt with upon the same footing. I find as a fact that the plaintiff company's three patents covered every possible mode of producing saccharin. One of the three patents must have been infringed. The right to damages is in its nature the same, the measure of damages is precisely the same, whichever of the three patents was in fact infringed. The nature and extent of the wrong done by the defendant does not depend upon the particular patent infringed. Justice requires that, under the peculiar circumstances of the case, the plaintiff company, who have certainly had a right infringed by the defendant, should not be without a remedy.

I shall therefore direct an inquiry, without mentioning any particular patent, whether any and what damages have been sustained by the plaintiff company by reason of the use by the defendant of the 33 lbs. of saccharin purchased by him in December, 1897, and January, 1898, or any other saccharin purchased by the defendant before June 1, 1899. I shall reserve the costs of the inquiry, and I shall expect the plaintiff company, before proceeding with the inquiry, to make a definite demand of a particular sum. I regret that evidence was not adduced at the trial as to the amount of damages.

With reference to the costs of the action, the plaintiff company have partly failed and partly succeeded. I do not regard with sympathy or favour actions of this nature brought against a purchaser. I give no costs to the plaintiff company up to and including judgment. The subsequent costs will be reserved.

Solicitors: *J. H. & J. Y. Johnson; J. W. Asprey.*

W. C. D.

COZENS-HARDY J.
1900
May 19.

In re BOWES.
EARL OF STRATHMORE *v.* VANE.

[1885 B. 5880.]

Administration—Solicitor—Costs—Foreign Documents—Translations.

Charges for translations of foreign documents made in a solicitor's office allowed in taxing costs relating to administration.

THIS was a summons by Edward Young Western, a defendant in an administration action, to review taxation of costs made in pursuance of an order in the action.

The defendant Western was a solicitor and an executor and trustee of the will of John Bowes, the testator, in the action. The will contained the following clause: "I declare that every executor or trustee of this my will who may be a solicitor shall be entitled to be paid for all business usually done by solicitors which he may perform in relation to the executorship on trusts hereof in the same manner as if he had not been an executor or trustee of this my will."

The taxation in question was made under an order of July, 1899, to tax the costs of the plaintiff and defendant from the foot of the last taxation, "the costs of the defendant Edward Young Western to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by him as executor and trustee of the testator's will and codicil beyond his costs of this action not already taxed and allowed."

The defendant Western claimed charges for translating certain French documents required in the administration. The translations had been made either by the defendant Western or by a clerk in his office—a competent French scholar—or, in one instance, by a lady who was a competent French scholar, but without knowledge of legal terms, and supervised in Mr. Western's office.

Similar charges had been allowed on previous taxations in the action by the late Master Buckley. The taxing master, in answer

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to objections, gave the following reasons for disallowing some of the items charged for translating documents: "(*a*) The translations were made by the clerks in the office of the objector. (*b*) No payment was made by the objector to his clerks for making same. (*c*) It is not suggested that the clerks who made the translations were professional translators. (*d*) In my judgment, *Ellington* v. *Clark*, *Bunnett & Co.* (1) supports my practice. (*e*) The present practice of the taxing masters is not to allow the items in question."

He disallowed one item on the ground that the lady who made the translation was not a professional translator, and was ignorant of legal terms, and therefore incompetent.

Hon. E. C. Macnaghten, Q.C., and *Heath*, for the summons. The case of *Ellington* v. *Clark*, *Bunnett & Co.* (1), referred to by the master, related to shorthand notes taken by a clerk to the solicitor to one interested party; they could not even be used for the purpose of the proceedings.

In a case like this it is distinctly to the advantage of the estate that the translations should be done in the office of the solicitor; it is not convenient that documents, some of which are of a confidential nature, should go out of the office. If the solicitor keeps competent persons for the purpose, it is only fair that their work should be paid for. Solicitors are liable to be taxed in respect of and entitled to charge for work other than strictly solicitor's work; for instance, a solicitor employed as an election agent: *In re Osborne* (2), or returning officer: *In re Jones* (3), is liable to have his bill taxed.

Vernon Smith, Q.C., and *Pitman*, for the trustees other than Mr. Western. If a solicitor has a clerk with special knowledge so that it is not necessary to have out of pocket expenses, only the ordinary solicitor's charges will be allowed. In *In re Norman* (4) Lord Esher remarks with reference to shorthand notes that a solicitor is not entitled to charge for notes taken by his clerk as if he went to a professional shorthand writer.

Hon. E. C. Macnaghten, Q.C., in reply.

(1) (1888) 38 Ch. D. 332.
(2) (1858) 25 Beav. 353.
(3) (1872) L. R. 13 Eq. 336.
(4) (1886) 16 Q. B. D. 673, 676.

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COZENS-HARDY J. I think the taxing master has taken a wrong view. Documents, and very numerous documents, in the French language were required for the use of the Court in the conduct of the litigation. This action, like many other modern actions, is one in which documents in a foreign language —correspondence and other documents—are brought before the Court. It is necessary that those documents should be translated into the English language, and I think it would be to the last degree inconvenient to hold that such documents, many of which may be of a highly confidential nature, must necessarily be sent out of the solicitor's office and entrusted to people called translators. It seems to me that every consideration of convenience in the conduct of litigation points to this—that it should be within the scope of the solicitor's duties, if he has a staff competent for the purpose, to assist the Court by translating the documents in a foreign language which have to be brought to the notice of the Court. I think that I might dispose of this case by saying that in this very action precisely similar allowances have been permitted by the late taxing master, Mr. Buckley, and I should be disposed to follow that precedent; but, as the question has been argued on general grounds, I think it proper to say that, apart from Mr. Buckley's taxation, it seems to me right for the taxing master to make such allowances as he may think fit to Mr. Western for making translations which were absolutely necessary for the due conduct of the case, and which have been used by the Court. In saying this, of course I do not wish to indicate that the taxing master should allow the particular figures which Mr. Western has claimed. They may be perfectly accurate, but on the other hand they may be excessive. I express no opinion on the question of quantum. All I say is that the matter must go back to the taxing master for him to make such allowances as he may think reasonable in respect of these translations.

Solicitors: *Western & Sons; Young, Jones & Co.*

D. P.

FARWELL J.

1900

April 11.

In re E. BISHOP & SONS, LIMITED.

[0092 of 1900.]

Company—Winding-up—Voluntary Winding-up—Prejudice to Creditors—Wishes of Creditors—Compulsory Order—Discretion of Court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 91, 145, 149.

The voluntary winding-up of a company is no bar to a compulsory order if the general body of the creditors desire it, although no individual creditor proves in accordance with s. 145 of the Companies Act, 1862, that his rights will be prejudiced by a voluntary winding-up.

In such a case the right of the general body of the creditors to have effect given to their wishes under ss. 91 and 149 is untouched by s. 145, although the primâ facie right of an individual creditor to a compulsory order, ex debito justitiæ, is restricted by that section.

In re West Hartlepool Ironworks Co., (1875) L. R. 10 Ch. 618, *In re Gold Co.*, (1879) 11 Ch. D. 701, and *In re Varieties, Limited*, [1893] 2 Ch. 235, followed.

In re New York Exchange, Limited, (1888) 39 Ch. D. 415, and *In re Russell, Cordner & Co.*, [1891] 3 Ch. 171, distinguished.

PETITION.

This was a petition by judgment creditors of the above company asking that the company might be wound up by or under the supervision of the Court.

The company was formed in May, 1896, with a capital of 150,000*l.*, divided into 150,000 shares of 1*l.* each, of which 30,083 had been issued; and the capital paid up or credited as paid up was 30,083*l.* The objects for which the company was established were, inter alia, to purchase and take over the business of pianoforte manufacturers formerly carried on by E. W. Bishop under the style of E. Bishop & Sons.

On February 24, 1900, the petitioners commenced an action against the company to recover a debt of 65*l.* 7*s.* 9*d.*

The company had issued debentures creating a floating security to the amount of 8500*l.*, all of which were held by Bishop, and on March 9, 1900, Stirling J. appointed D. F. Basden receiver and manager in a debenture-holders' action commenced by Bishop. There were no other secured creditors

of the company, but there were unsecured creditors whose claims amounted to upwards of 10,000*l*.

On March 10, 1900, the petitioners obtained judgment against the company for 65*l*. 7*s*. 9*d*., and on March 12 for 8*l*. 3*s*. 6*d*. costs.

On March 13, 1900, the judgment being unsatisfied, the petitioners presented a petition for a winding-up order.

On March 14, 1900, the company passed an extraordinary resolution for voluntary winding-up and appointed Basden liquidator.

On the petition coming before Cozens-Hardy J. on March 28, 1900, he ordered it to stand over with leave to amend by alleging the voluntary winding-up, and any circumstances shewing that creditors would be prejudiced by a voluntary winding-up.

The amended petition alleged that the petitioners had communicated with the creditors who appeared at the hearing on March 28, and had asked to be furnished with any information in their possession tending to shew that the position of creditors of the company would be prejudiced by the continuance of a voluntary winding-up under supervision with the object of making the necessary allegations in the petition, but the petitioners had been unable to obtain any such information down to the date of amendment.

They asked alternatively for a compulsory winding-up or supervision order. About 90 per cent. in value of the unsecured creditors supported the petition, and asked for a compulsory winding-up order.

It appeared that of the 30,083 shares issued, Bishop, the manager and the vendor to the company, held 26,847, and other members of his family held 3009, so that he had complete control of the voting power. It was also suggested that Basden was not quite an independent liquidator, as he was practically the nominee of Bishop, and he had been auditor of the company up to June, 1898. The creditors alleged that under the circumstances their rights would be prejudiced by the continuance of the voluntary winding-up, but no other evidence of prejudice was given.

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E. BISHOP & SONS, LIMITED, *In re.*

Stewart-Smith, for the petitioners, asked for a compulsory order.

Clauson, Maugham, and *T. L. Wilkinson*, for creditors in support. The Court must have regard to the wishes of the creditors: Companies Act, 1862, ss. 91, 149 (1); and the voluntary winding-up is no bar: s. 145.

In this case 90 per cent. in value of the unsecured creditors support the petition. The control of the company is in the hands of Bishop and his immediate family, and Basden who is practically the nominee of Bishop is not only liquidator, but also receiver in the debenture-holders' action. There is no personal objection to Basden, but these circumstances are enough to shew that the creditors will be prejudiced by the voluntary winding-up within the meaning of s. 145, if that be necessary: *In re Medical Battery Co.* (2)

Having regard, however, to ss. 91 and 149, the wishes of the creditors justify a compulsory order without any proof of prejudice under s. 145.

Upjohn, Q.C., and *Rowland Whitehead*, for the company. We admit that the company is commercially insolvent, i.e.,

(1) The Companies Act, 1862, provides as follows:—

Sect. 91: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned . . . . for the purpose of ascertaining their wishes: . . . . In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company."

Sect. 145: "The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up."

Sect. 149: "The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned . . . . for the purpose of ascertaining their wishes . . . .: In the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company."

(2) [1894] 1 Ch. 444, 448.

unable to pay its way as a going concern. But there is no ground for a compulsory order. The objection to Basden as liquidator is purely technical; but the company will consent to the appointment of an independent liquidator, and Basden can act jointly with him, or retire altogether, as the Court thinks best. In *In re Medical Battery Co.* (1) Vaughan Williams J. intimated that an offer of this kind might have led to a different result.

Again, s. 145 implies that a voluntary winding-up is a bar to a compulsory order, unless the Court is judicially of opinion that the creditors will be prejudiced by a voluntary winding-up.

The expressio unius doctrine applies. Contributories, for instance, are barred, unless the voluntary winding-up is something like a fraud or a sham so that it can be disregarded, or unless they are supported by creditors, in which case the relief is given to avoid the expense of a fresh creditors' petition: *In re Gold Co.* (2) In the latter case the creditors would of course have to prove prejudice. When a creditors' petition is presented, followed by a voluntary winding-up, the regular practice is to direct the petition to stand over with liberty to amend and allege prejudice to creditors. This is what Cozens-Hardy J. did in the present case, but not a single creditor has shewn prejudice.

[FARWELL J. Sect. 145 must be read with ss. 91 and 149, which provide that the Court may have regard to the wishes of the creditors: Buckley on Companies, 7th ed. p. 361.]

A primâ facie case of prejudice must first be made out to found the jurisdiction. If, however, the petitioning creditor is opposed by a large majority of other creditors, the Court may have regard to their wishes. In such a case the petitioning creditor is not entitled to an order ex debito justitiæ.

[FARWELL J. referred to *In re Varieties, Limited.* (3)]

In that case Vaughan Williams J. appears to have thought that the conduct of the shareholders whose votes carried the resolution for the voluntary winding-up required investigation, i.e., there was a suspicion of mala fides. It was moreover a

(1) [1894] 1 Ch. 444, 448. (2) 11 Ch. D. 701.
(3) [1893] 2 Ch. 235.

FARWELL J. 1900 E. BISHOP & SONS, LIMITED, *In re.*

contributories' petition, and s. 145 was not directly referred to. There is no suggestion of mala fides in the present case.

FARWELL J. The real question I have to determine is what is the true construction of ss. 91, 145, and 149 of the Companies Act, 1862. I think s. 145 means what it says, and not what the company suggest. The company read it as meaning that a voluntary winding-up shall be a bar to the right of any creditor of the company to have the same wound up by the Court, unless the Court is of opinion that the rights of such creditor will be prejudiced. But a resolution for voluntary liquidation is only an expression of the wishes of the shareholders as to the mode in which liquidation shall be carried out. Now s. 145 is preceded by s. 91, which directs the Court to have regard to the wishes of the creditors or contributories, and is followed by s. 149, which directs the Court, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, &c., to have regard to the wishes of the creditors or contributories, and it is of course well settled that in the case of insolvent companies the wishes of creditors come first. It is to my mind impossible to hold that, on the fair reading of these three sections, the Legislature meant that the wishes of the shareholders were to override the wishes of the creditors, if the shareholders express their wishes in the form of a resolution, and that too, whether such resolution is passed before or after the date of the presentation of the petition. The true view is that the three sections are to be read together, and that s. 145 is inserted both as a security to the creditor that he shall not be unduly deprived of his right to a winding-up order, and as a protection to the shareholders that they shall not be necessarily driven into compulsory liquidation by one creditor or a few creditors by reason of the mere expression of his or their wish without shewing any prejudice to themselves by reason of the voluntary liquidation. Any unpaid creditor is as between himself and the company primâ facie entitled to a compulsory order ex debito justitiæ: this right is undoubtedly restricted by s. 145; but the right of the general body of creditors to have effect given to their

wishes under ss. 91 and 149 is untouched by s. 145. I see nothing inconsistent in saying to the petitioning creditor on the one hand, "You have not shewn that you are prejudiced by the voluntary liquidation"; and in saying to the general body of creditors on the other hand, "Effect shall be given to your wishes, although the petitioner does not shew that he is prejudiced."

Sect. 145 is in fact a directory section, not a section which excludes jurisdiction.

The authority relied upon by the company was *In re Gold Co.* (1), where the petition was that of a shareholder. Now, if s. 145 creates an absolute bar to a creditor unless he can prove that he is prejudiced, it must certainly create by necessary implication an absolute bar to a shareholder whether he is prejudiced or not. But the Court of Appeal, in *In re Gold Co.* (1), while expressing the view that if it had been open to them they would have been disposed to decide that s. 145 was such a statutory bar, felt themselves prevented from so deciding by the judgments of their predecessors, and Vaughan Williams J. made an order in *In re Varieties, Limited* (2), on this footing.

If s. 145 created such an absolute statutory bar, the Court could not disregard it on the ground that the resolution for the voluntary liquidation was induced by fraud, or on any other ground. The only possible course open to an aggrieved shareholder in such a case would be an action impeaching the resolution on the ground of fraud so as to get rid of it altogether.

But since the case was argued, my attention has been called to three cases which were not cited to me and to which I will now refer. The first is *In re West Hartlepool Ironworks Co.* (3) There does not appear from the report of that case to have been any evidence that the petitioner would be prejudiced; but s. 145 was cited, as appears from the report of the case in the *Weekly Reporter* and the *Law Times*, although not in the LAW REPORTS, and I cannot suppose that it was not present to the

(1) 11 Ch. D. 701.
(2) [1893] 2 Ch. 235.
(3) L. R. 10 Ch. 618, 620; 23 W. R. 938; 33 L. T. 149.

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minds of the Court, and it would have been a very short mode of disposing of the case if s. 145 had the effect contended for by the company. Mellish L.J. treats the case as depending entirely on the wishes of the creditors, and his judgment is quite inconsistent with the idea that s. 145 overrides ss. 91 and 149. He says: "Although a creditor of a company who cannot get paid his debt after having served his proper summons is entitled ex debito justitiæ as between him and the company to an order for winding-up, yet, in my opinion, if a resolution for a voluntary winding-up has been passed before the time when the petition for a compulsory winding-up comes on to be heard, the 91st and the 149th sections of the Act make it the duty of the Court to have regard to the wishes of the body of the creditors in determining whether there shall be a compulsory winding-up, or whether the voluntary winding-up shall be continued under supervision. The 149th section says that the Court may have regard to the wishes of the creditors if proved to it by any sufficient evidence. If there is no sufficient evidence then it may order a meeting of the creditors to be called. The question really in this case is whether there is sufficient evidence to enable us to decide without calling a meeting of creditors that the majority of creditors desire to have the voluntary winding-up continued under supervision, and if they do, whether there is anything in the peculiar circumstances of this case which makes it unjust as respects the particular creditor who has presented the petition, that such an order for continuing the voluntary winding-up should be made."

In *In re New York Exchange, Limited* (1), the point decided was that the petitioning creditor was affected by s. 145, although he had presented his petition before the resolution was passed. There is nothing in this case contrary to the view that I have expressed; indeed, Fry L.J. refers to s. 91 as being applicable to the case before the Court; but it did not assist the petitioner, because the other creditors who appeared opposed the compulsory order. The last case is *In re Russell, Cordner & Co.* (2) The point really decided in that case was that the Companies Act, 1890, had not altered the law under s. 145 of the Act

(1) 39 Ch. D. 415, 423. (2) [1891] 3 Ch. 171, 175.

of 1862; and the petitioner stood alone, being opposed by all the other creditors who appeared. This, therefore, is not a decision contrary to the view that I have expressed, and North J. expresses no opinion on it, although he suggests the point by the question that he asks on p. 173.

In the case before me, 90 per cent. of the whole body of creditors desire a compulsory order; and unless I can hold that s. 145 overrides s. 91 and s. 149, and absolutely prevents me from attending to their wishes, I must make, as I do, a compulsory order. Taking the view I do, it is unnecessary that the petition should allege prejudice to the petitioning creditors. But if it were necessary, I am prepared to follow Vaughan Williams J. in *In re Medical Battery Co.* (1), and to hold that the creditors under the circumstances of this case are prejudiced by the voluntary liquidation.

Solicitors: *Busk, Mellor & Norris; Wilde, Moore & Wigston; McKenna & Co.; Stock & Slater; Fraser & Christian.*

(1) [1894] 1 Ch. 444, 448.

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FARWELL J.

1900

May 28.

HAY *v.* NORTHCOTE.

[1900 H. 360.]

Conflict of Laws—Nullity of Marriage—Consular Marriage in France—Frenchman and Englishwoman — Validity of Ceremony — Consular Marriage Act, 1849 (12 & 13 *Vict. c.* 68)—*Foreign Marriage Act*, 1892 (55 & 56 *Vict. c.* 23).

A marriage between a Frenchman and an Englishwoman duly solemnized in France under the Consular Marriage Act, 1849 (repealed and virtually re-enacted by the Foreign Marriage Act, 1892), is valid as regards form in England, though declared invalid as regards form by a French Court.

Simonin v. *Mallac*, (1860) 2 Sw. & Tr. 67, followed.

WITNESS ACTION.

This was an action to set aside a settlement on the ground of failure of consideration.

On March 24, 1880, Louis Alphonse Duperrel, a Frenchman domiciled in France, married Louisa Harriet Tyrwhitt, an Englishwoman domiciled in England, before the British consul at Bordeaux, in the manner provided by the Consular Marriage Act, 1849, the said consul being duly authorized to act under that Act.

By a settlement made July 20, 1880, between the wife's father, an Englishman, resident in England, of the one part, and an English trustee, resident in England, of the other part, reciting that previous to the marriage the father agreed to assign certain policies of assurance in certain English offices upon the trusts thereinafter declared, and also to enter into a covenant for the payment of an annual sum of 40*l.* in manner thereinafter provided, and reciting that the marriage had been duly solemnized, it was witnessed that for effectuating the said agreement and in consideration of the premises the father assigned the policies to the trustee upon trust for the wife for her life for her separate use, and after her decease upon trust for her children by Louis Alphonse Duperrel or any future husband, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and in default of such issue upon trust for the wife's statutory next

of kin. And the father covenanted that during the joint lives of himself and the wife he would pay the annual sum of 40*l.* to the trustee, who should pay it to the wife in the same manner as the income of the trust moneys. He also covenanted to pay the premiums on the policies.

On March 15, 1882, the tribunal of first instance of Bordeaux made a decree whereby, after reciting that the wife prayed for nullity of the act of marriage, that the husband concurred therein, that a marriage contracted in France by a Frenchman must be solemnized before the officer of the civil establishment of one of the parties, that, therefore, the British consul at Bordeaux was not qualified to receive such act, and that the said act was absolutely null and void, for these reasons, the tribunal giving judgment in first resort declared the marriage null and void.

The wife then returned to her father. The father kept up the policies, but did not pay the 40*l.* annuity. He died on July 21, 1899, having appointed the plaintiff and the defendant G. R. Northcote his executors. The defendants G. R. Northcote and G. S. Northcote were the present trustees of the settlement, and had received the policy moneys. The husband had been dead for some years.

The plaintiff, relying on the decree of nullity, brought this action against the present trustees and the wife, and claimed a declaration that the settlement was not binding on the father's estate and ought to be delivered up, and that the trustees might be ordered to pay the trust funds to the executors.

The wife put in no defence.

The plaintiff contended, first, that the marriage was void in England, and, secondly, that the settlement was therefore void on the ground of failure of consideration.

The arguments on the first point are alone reported.

Bramwell Davis, Q.C., and *E. S. Ford*, for the plaintiff. The marriage was solemnized in France, and the validity of the ceremony must be decided by French law alone: *Sottomayor* v. *De Barros*. (1) Unless the proceedings offend against

(1) (1877) 3 P. D. 1.

FARWELL J. 1900 HAY v. NORTHCOTE.

English views of substantial justice, the judgment of the French Court is conclusive: *Pemberton* v. *Hughes*. (1)

Badcock, *Q.C.*, and *Peterson*, for the trustees. The marriage was valid under the Consular Marriage Act, 1849. (2) The French Court were apparently unaware of the provisions of that Act. Their judgment cannot possibly affect the statutory validity of the marriage in England. The effect of the Act was to render the marriage as valid, as regards form, as if it had been solemnized in England: Dicey on the Conflict of Laws, p. 637. It must, therefore, be considered as solemnized in England, in which case a foreign declaration of nullity is of no effect here: *Simonin* v. *Mallac* (3), unless it is based on incapacity: *Sottomayor* v. *De Barros*. (4) *Pemberton* v.

(1) [1899] 1 Ch. 781.

(2) The Consular Marriage Act, 1849 (repealed and virtually re-enacted by the Foreign Marriage Act, 1892), provides as follows:—

"Whereas an Act was passed in the fourth year of the reign of His late Majesty King George the Fourth, intituled 'An Act to relieve His Majesty's subjects from all doubt concerning the validity of certain marriages solemnized abroad': And whereas the provisions of the said Act are applicable only to the cases of marriages solemnized by a minister of the Church of England in the chapel or house of any British ambassador or minister residing within the country to the Court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, and of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad:

"And whereas large numbers of Her Majesty's subjects are resident abroad at places where the provisions of the said Act are not applicable: And whereas it is expedient to afford greater facilities for the marriage of Her Majesty's subjects resident abroad:

"Be it therefore enacted . . . . that all marriages (both or one of the parties thereto being subjects or a subject of this realm) which from and after the passing of this Act shall be solemnized in the manner in this Act provided in any foreign country or place where there shall be a British consul duly authorized to act in such foreign country or place under this Act shall be deemed and held to be as valid in the law as if the same had been solemnized within Her Majesty's dominions with a due observance of all forms required by law."

Sect. 9. ". . . . Every such marriage shall be solemnized at the British consulate, with open doors, between the hours of eight and twelve in the forenoon, in the presence of two or more witnesses, and may be solemnized, in the presence of the consul, ... or may, where the parties shall so desire, be solemnized by the consul; . . . ."

(3) 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

(4) 3 P. D. 1.

Hughes (1) was a case of divorce, the considerations as to which are entirely different from those of nullity: Dicey on the Conflict of Laws, p. 394.

Bramwell Davis, Q.C., in reply. The point on the Consular Marriage Act, 1849, ought to have been taken in France. Even if the decision of the French Court was wrong, the English Court ought to follow it: *Pemberton* v. *Hughes*. (1)

FARWELL J. The point I have to consider is whether the marriage which was declared null and void in France was also null and void in this country. It is of course well settled that a marriage may be valid in one country and at the same time void in another.

In my opinion this case is indistinguishable from *Simonin* v. *Mallac*. (2) I have the *Law Journal* report of that case before me. The head-note is as follows: "The Court has jurisdiction to inquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage. A marriage in England, between two foreigners domiciled abroad, if celebrated in conformity with the law of England, is, by the law of this country, valid, although such marriage has been contracted by them in England with the intention of evading the law of their own country, and on that ground has been there declared void."

The parties in the present case were not two foreigners, but an Englishwoman and a Frenchman, who were married before the British consul at Bordeaux in 1880. Now a marriage of this nature was at that date governed by the Consular Marriage Act, 1849. [His Lordship read the preamble and 1st section.]

It is admitted that the marriage was solemnized in the manner provided by the Act. There is, therefore, first, an enactment of the English Legislature saying that a marriage solemnized as this was, before a duly authorized British consul, shall be valid according to English law, and, secondly, an English settlement providing for the wife and children, the trustee being an Englishman resident in England, and the trust funds being in this country.

(1) [1899] 1 Ch. 781. (2) 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

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I am asked to say that the marriage was void here, because it was void in France. It is plain, however, that the marriage was not void in England. The Act was exactly followed and covered the very case, thereby giving statutory validity to the marriage.

In *Simonin* v. *Mallac* (1) Sir Cresswell Cresswell, in delivering the considered judgment of himself, Channell B., and Keating J., says (2): "The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects." In my opinion, on the true construction of the Act, this marriage must be treated as solemnized in England. The consulate must for this purpose be considered as English territory. The English Legislature cannot make French territory English, but it can say that acts done there in a certain manner shall have the same effect as if the territory were English. *Simonin* v. *Mallac* (1) is therefore applicable, and whether or not the marriage was good in France, it was perfectly good in England.

In *Sottomayor* v. *De Barros* (3) the spouses were by the law of their domicil under a personal incapacity to contract marriage inter se, and *Simonin* v. *Mallac* (1), though distinguished on that ground, was cited by the Court of Appeal without disapproval. I therefore hold that the settlement is binding on the father's estate.

Solicitors: *Robins, Hay, Waters & Hay.*

(1) 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.
(2) 2 Sw. & Tr. 85; 29 L. J. (P. & M.) 105.
(3) 3 P. D. 1.

G. R. A.

ROSENBAUM *v.* BELSON.

BUCKLEY J.

[1900 R. 41.]

1900

May 16, 17.

Vendor and Purchaser — Principal and Agent — Instructions to Sell — Real Estate—Authority to Sign Contract—Specific Performance.

Instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, are an authority to the agent to make a binding contract, including an authority to sign an agreement for sale.

On December 4, 1899, Mr. L. Belson signed a memorandum headed "Wellesley Street, Stepney Green. Ground rent 17*l.* 10*s.* Mortgage 740*l.* reduced to 640*l.* 800*l.*" The remainder of the document was as follows: "Please sell for me my houses 75, 77, 79, 79A, 81, 83, Wellesley Street, Stepney Green, and I agree to pay you by way of commission the sum of 2½ per cent. on the purchase price accepted. L. Belson." This memorandum he gave to Messrs. Dickson & Newman, who obtained an offer for the property of 735*l.*, afterwards increased to 750*l.* They told Mr. Belson of it; he was not satisfied, and the price was brought up to 785*l.* They then told him that he must say definitely whether he was prepared to take that price, and on December 7, 1899, he signed a letter as follows: "To Dickson & Newman, 143, Commercial Street, E. Dear Sir,—75 to 83, Wellesley Street. I hereby agree to accept your client's (Mr. Rosenbaum's) offer of seven hundred and eighty-five pounds for the above property. Yours faithfully, L. Belson."

On December 11 Dickson & Newman received and signed a receipt for 78*l.* 10*s.*, the deposit, and signed an agreement as follows: "It is hereby agreed between Messrs. Dickson & Newman, as agents on behalf of the vendor Mr. L. Belson, and Mr. S. Rosenbaum, of 5, Bell Lane, Spitalfields, that this 11th day of December, 1899, the said S. Rosenbaum has become the purchaser of the leasehold property (24 years) known and situate at (75–83) Wellesley Street, Stepney Green, for the sum of seven hundred and eighty-five pounds (785*l.*), and that he has paid to the said Dickson & Newman the sum of seventy-

BUCKLEY J. 1900 ROSENBAUM v. BELSON.

eight pounds 10*s.* as a deposit and in part payment of the said purchase-money.

"As witness our hands this 11th day of December, 1899.

"This contract is made subject to the particulars given by vendor being correct."

This agreement was also signed by Mr. Rosenbaum.

Mr. Belson refused to complete the sale, and Mr. Rosenbaum brought this action against him for specific performance of the agreement of December 11, 1899. Several questions were raised, but the defendant rested his case on the want of verbal or written authority in the agents to sign the agreement.

W. A. Jolly, for the plaintiff.

John Montefiore and *W. S. M. Knight*, for the defendant. There was no agreement by the defendant to sell this property. He did not authorize Messrs. Dickson & Newman to sign a contract on his behalf. The letter of December 7, requesting them to sell the houses, only gave them power to act as his agents for the purpose of negotiating a sale, not to complete the contract: *Chadburn* v. *Moore*. (1)

[BUCKLEY J. referred to *Hamer* v. *Sharp* (2); Fry on Specific Performance, 3rd ed. p. 248.]

The evidence shews that the defendant did not give Messrs. Dickson & Newman verbally any authority to sign the contract.

W. A. Jolly, in reply. An authority to sell includes an authority to conclude a binding contract, and therefore, in the case of land, to sign a written contract. The authority need not be in writing: *John Griffiths Cycle Corporation* v. *Humber & Co.* (3), explaining *Smith* v. *Webster*. (4)

Cur. adv. vult.

May 17. BUCKLEY J. referred to the facts and the evidence, and proceeded:—The contract relied upon being here signed by an agent, the plaintiff must, no doubt, make out that the act done by the agent was within his authority as agent. The

(1) (1892) 61 L. J. (Ch.) 674; 67 L. T. 257.

(2) (1874) L. R. 19 Eq. 108.

(3) [1899] 2 Q. B. 414, 417, 418.

(4) (1876) 3 Ch. D. 49.

defendant's counsel went so far as to contend that an agent for sale has not authority to sign a contract unless express authority to sign a contract, as distinguished from authority to sell, is proved. In my opinion, this is not the law. The authority in the present case is in the terms: "Please sell for me my houses, and I agree to pay you a commission on the purchase price accepted." This is an authority to sell. A sale primâ facie means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing. I do not find anything in the circumstances of this case which induces me to say that the word "sell" here means less than this. The authorities upon the point are but few. In *Hamer* v. *Sharp* (1) the authority was in the words: "I request you to procure a purchaser . . . . and to insert particulars . . . . in your monthly estate circular till further notice." In *Godwin* v. *Brind* (2) the advertisement intimated that, "to treat and view," applications were to be made to a certain person. In *Chadburn* v. *Moore* (3) the instructions were not in writing, but the learned judge found that the agent was authorized to find a purchaser for the houses, and to negotiate a sale. In *Prior* v. *Moore* (4) the owner instructed an estate agent to put the property on his books as for sale, and informed him of the lowest price he would accept. In these cases it was held that the agent was not authorized to sign a contract. None of these, in my judgment, covers the present case. In *Hamer* v. *Sharp* (1) Hall V.-C. says (5): "The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and none as to the title of the property, and mentioning none of those special stipulations which it might be proper to insert in conditions in reference to the title, that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions,

(1) L. R. 19 Eq. 108.
(2) (1868) L. R. 5 C. P. 299, n.
(3) 61 L. J. (Ch.) 674; 67 L. T. 257.
(4) (1887) 3 Times L. R. 624.
(5) L. R. 19 Eq. 112.

BUCKLEY J. 1900 ROSENBAUM v. BELSON.

without making any provision whatsoever as to title." Lower down, after commenting on the fact that generally an agreement for sale has to be protected by conditions of title, he goes on: "As an intelligent and well-informed person, he could not suppose that he was properly discharging his duty to his principal when he signed the contract which he signed: such a contract was not one within the scope of his authority to sign. If he had a right to enter into any contract at all, it was one of a different description, and on that ground alone—this being a bill for specific performance, and the Court having a discretion—I hold that the alleged contract, if it be a contract, is not one which the Court will decree to be carried into effect."

It is noticeable that the Vice-Chancellor does not say that the agent has no right to enter into a contract at all, and he dismissed the bill, not on the ground that he had no right to enter into a contract, but on the ground that he had no right to enter into such a contract as he had entered into, and that, the bill being for specific performance, the Court in its discretion would not enforce the contract, being such as it was in that case. But on the question of authority he went on to state his view of the law. This is only dictum, but he says: "Taking that view of the case, it is not necessary for me to decide the question of authority, but I nevertheless state my opinion to be, that when instructions are given to an agent to find a purchaser of landed property, he, not being instructed as to the conditions to be inserted in the contract as to title, is not authorized to sign a contract on the part of the vendor." The words with which he had to deal were not words authorizing the agent to "sell," but to "find a purchaser." To my mind there is a substantial difference between those expressions. Authorizing a man to sell means an authority to conclude a sale; authorizing him to find a purchaser means less than that—it means to find a man willing to become a purchaser, not to find him and also make him a purchaser.

In *Saunders* v. *Dence* (1) Field J. distinguished *Hamer* v. *Sharp* (2), saying that "all that Hall V.-C. in that case decided,

(1) (1885) 52 L. T. 644, 646. (2) L. R. 19 Eq. 108.

as I understand it, was that if you go to an estate agent, and tell him you have a property to sell, and that you want a purchaser, and you tell him what you have made up your mind shall be the price, and to a certain extent what shall be the conditions, and you instruct him to try and find a purchaser, that is not sufficient, under those circumstances, to authorize the agent to make a contract without any conditions whatever with regard to the title."

I have been unable to find any case in which it has been held that instructions given by A. B. to sell for him his house, and an agreement to pay so much on the purchase price accepted, are not an authority to make a binding contract, including an authority to sign an agreement. If a power of attorney were given to A. B. to sell an estate, he would, in my opinion, be entitled, in the absence of anything narrowing the meaning of the word "sell," not only to negotiate for but to sign an agreement for sale; and that would give to the word "sell" its full meaning—namely, to conclude a binding agreement for sale.

It is not here alleged that the contract signed is not a reasonable and proper contract, having regard to the nature of the property.

But beyond these considerations as to the general law, I find as a fact in this case that on December 7 the defendant was told that Dickson & Newman would sign a contract in exchange for the payment of the deposit, and that he assented to that. They thus had, in addition to the letter of December 4, 1899, a verbal authority to sign a contract. In my opinion, therefore, the plaintiff succeeds, and I give judgment for specific performance with costs.

Solicitors: *Brighten & Lemon; John Brockett Sorrell.*

H. C. R.

WRIGHT J.

1900

Feb. 28;
March 7.

In re BANK OF SYRIA.

OWEN AND ASHWORTH'S CLAIM.
WHITWORTH'S CLAIM.

[1143 of 1898.]

Company—Directors—Quorum—Articles of Association.

The articles of association of a company provided (38) that the number of members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three, (42) that the continuing council might act notwithstanding any vacancy, and (53) that the council might determine the quorum necessary for the transaction of business.

The number of members of the council became reduced to two. It was alleged that the council had passed a resolution fixing the quorum at three :—

Held, that, even if the resolution had been passed, a security given by the two members of the council in favour of persons who had no knowledge or notice of the irregularity was valid.

Kirk v. *Bell*, (1851) 16 Q. B. 290, distinguished.

THE Bank of Syria, Limited, was registered on March 4, 1893, under the Companies Acts, 1862 to 1890, as a company limited by shares.

Amongst its objects, as stated in the memorandum of association, were "carrying on the business of banking," and borrowing or raising or securing the payment of money in such manner as the company should think fit. The company had no directors—so-called—but a council of administration. The articles of association, so far as material, were as follows :—

"32. The following persons, viz., Mr. John Robert Pilling, Mr. Henry Hargreaves Bolton, Mr. William Ernest Whitworth and Mr. William Parker shall form the first council of administration . . . . and the said John Robert Pilling shall be the president of the council. . . . .

"34. The council of administration is invested with full power for conducting the affairs of the company either by its own body, or by delegation as may be deemed necessary in the interest of the company.

"35. Without prejudice to the general powers conferred by the last preceding clause and so as not in any way to limit or restrict those powers, and without prejudice to any other powers conferred by these presents, it is hereby expressly declared that the council shall have the following powers:— . . . .

"(*f*) To execute in the name and on behalf of the company in favour of any member of the council or other person who may incur or be about to incur any personal liability for the benefit of the company such mortgages of the company's property (present and future) as they think fit. . . . .

"38. The number of members of the council shall not be less than three nor more than nine."

"42. The continuing council may act notwithstanding any vacancy."

"53. The council may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business . . . . Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A member may at any time summon a meeting of the council."

"55. The council may delegate any of its powers to committees consisting of such member or members of their body as they think fit. . . . ."

At the date of the transactions mentioned below the members of the council (below called "the directors") were reduced in number to two only, namely, Pilling and Whitworth. It was agreed between these two directors and John Owen and James Ashworth that Owen and Ashworth should lend the company 4000*l*., and on September 19, 1894, they advanced that sum to the company. As a matter of fact the cheque was made payable to Pilling, but the amount was credited to the account of Owen and Ashworth in the books of the company and in the pass-book delivered to them.

By a memorandum in writing under the common seal of the company, stated thereon to be "affixed hereto in the presence of W. E. Whitworth and J. R. Pilling, two members of the council of administration," it was witnessed that Owen and

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Ashworth had "this 19th day of September, 1894, opened a deposit account with" the company "in the sum of 4000*l.* and upwards" in consideration whereof the company agreed to pay interest thereon at 4*l.* per cent., and charged and mortgaged to secure the 4000*l.* and upwards certain unpaid capital of the company. The facts in Whitworth's case were that the company had overdrawn its account with Lloyd's Bank, Limited, which held certain securities given by the company acting only by Pilling and Whitworth. Lloyd's Bank having demanded payment, Whitworth, being still a director, paid off the amount owing and took a transfer of the securities.

An order having been made to wind up the company, Owen and Ashworth claimed to prove for the 4000*l.*; but the liquidator rejected the proof on the grounds (1.) that the alleged debt was incurred by the company at a time when there were only two directors, and that they had no power to charge its uncalled capital; (2.) that the 4000*l.* was not advanced to or for the use of the company; (3.) that the lenders had accepted Pilling as their debtor in lieu of any claim they might have had against the company. He also rejected Whitworth's proof.

Owen and Ashworth and Whitworth applied to the Court to reverse the decision of the liquidator and admit their respective proofs. The application was heard in court on February 28 and March 7, when witnesses were cross-examined on their affidavits.

Martelli, for Owen and Ashworth. The loan was to the bank, and nothing occurred to alter the character of the transaction. "Where the articles name a minimum number of directors and also contain an article in this form"—clause 56 of Table A—"a quorum of a board consisting of continuing directors of less than the minimum number may act. Secus, if the continuing directors are less than a quorum": Buckley on Companies, 7th ed. p. 542, citing *In re Scottish Petroleum Co.* (1); *Newhaven Local Board* v. *Newhaven School Board.* (2) In *In re Scottish Petroleum Co.* (1) art. 66 was like art. 38 in the present case except that the minimum was four, and art. 83 in that

(1) (1883) 23 Ch. D. 413. (2) (1885) 30 Ch. D. 350.

case was like art. 42 in the present case. By art. 84 in that case, until otherwise determined, two directors were to be a quorum. The Court of Appeal held that, although there was not a board of four directors, a quorum of two could allot shares. In the present case there is no evidence that it was ever determined that the quorum of directors should be more than two.

If there was any irregularity it does not invalidate the claim of Owen and Ashworth, for they had no knowledge or notice of it: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1) That shews that outside persons dealing with a company are entitled to assume that its internal regulations have been complied with.

Percy F. Wheeler, for the liquidator. Art. 38 says that the number of members of the council shall not be less than three, and all persons dealing with the company had notice of that article. Art. 42 enables the council to act notwithstanding any vacancy; but that only means that a quorum must be present, except perhaps in cases of filling up vacancies and emergency. Where the regulations of the company are imperative, as in this case, and not merely directory, and require a certain minimum number, while the number is less than that minimum even a quorum cannot act as a board: *Kirk* v. *Bell.* (2)

[WRIGHT J. Is there anything like art. 42 there?]

No. Art. 42 is like one of the articles in *In re Scottish Petroleum Co.* (3), but in that case a quorum of two was sufficient under the articles and two directors acted. In *York Tramways Co.* v. *Willows* (4) the articles provided (68) that the number of the board should be not less than three, and (72) that any casual vacancy might be filled up by the board, and that the continuing board might act notwithstanding any vacancy in their body. When there were only two directors of the company, those two allotted shares to the defendant. The defendant was held liable on the shares on the ground that he had confirmed the allotment to himself; but Manisty J. held that art. 72 only meant that the continuing board could

(1) [1895] 1 Ch. 629.
(2) 16 Q. B. 290.
(3) 23 Ch. D. 413.
(4) (1882) 8 Q. B. D. 685.

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act to the extent of filling up a vacancy—not that a board of two could act in the teeth of art. 68.

Where articles provide that the business of the company shall be conducted by not less than a specified number of directors, the words are imperative, and not merely directory: *Bottomley's Case.* (1) If the two directors could not bind the company, the fact that the company took some benefit by the contract does not make the company liable: Lindley on Companies, 5th ed. p. 235.

[WRIGHT J. At page 236 there is the following passage: "From these doctrines there has been developed a rule to the effect that a company is liable to refund money improperly borrowed by its directors but in fact bonâ fide applied in discharging debts or liabilities of the company which could have been enforced against it, or bonâ fide applied for any other legitimate purpose for which it might have come under liability."]

It is for the applicants to make out a case of subrogation.

The liability, if originally that of the company, was ultimately, with the consent of the applicants, transferred so as to bind only Pilling. [He also referred to Buckley on Companies, 7th ed. p. 549.]

Martelli, in reply. All the circumstances point to the loan being made to the company, which was acting in the ordinary course of its banking business; and nothing occurred to shift the liability on to Pilling's shoulders. Art. 55 enabled the directors to delegate any of the board's powers to any member or members of it. Persons dealing bonâ fide with a managing director may assume that he has all the powers he purports to exercise if they are powers which under the company's constitution a managing director can have: *Biggerstaff* v. *Rowatt's Wharf.* (2) [He also referred to *Harris* v. *Farwell* (3).]

WRIGHT J. In this case I feel a great deal of doubt on the facts, but I think the true nature of the transaction was that

(1) (1880) 16 Ch. D. 681. (2) [1896] 2 Ch. 93.
(3) (1851) 15 Beav. 31.

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Owen and Ashworth treated Pilling as the managing director of the bank, and, believing that he had power to accept a deposit of money to remain at interest with the bank, did intend to deposit the money at the bank for the purposes of the bank and on the faith of the agreement of September 19, 1894, signed by Whitworth and Pilling as members of the council of administration. I do not think that advance, although it was made by a cheque to Pilling's order, could fairly be regarded as an advance to him—at any rate, for his own purposes—or as an advance to him on the faith that he could deal with it by depositing it in the bank. It seems to me that if, as regards Owen and Ashworth, Pilling had power to bind the bank by what he did, and he and Whitworth had power to bind the bank by the resolution of which a minute was made, there was a deposit by the applicants with the bank in respect of which they would be entitled to prove if nothing else had happened.

But the difficulty in their way is a letter of February 27, 1895, which shews that there was an arrangement with Pilling, who was still managing director, by which the money was taken by Owen and Ashworth out of the bank and re-lent by them to Pilling personally. It seems to me that if novation was wanted, there was novation; but at any rate, the money having been withdrawn from the bank with the consent of its managing director and advanced by Owen and Ashworth to Pilling, Owen and Ashworth ceased to be in the position of creditors of the bank, and are not in a position to maintain their claim.

Then the important question arises as to the effect of the number of directors being reduced below the minimum. By clause 38 of the articles of association of the company the members of the council of administration—that is to say, the directorate—shall not be less than three nor more than nine. By art. 42 it is provided that "the continuing council may act notwithstanding any vacancy"; and by art. 53 it is provided that the council "may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit and determine the quorum necessary for the

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transaction of business." No quorum, so far as we are informed, ever has been determined. As a matter of fact, when this deposit was made by the applicants with the company there were only two directors, namely, Pilling and Whitworth, and I am asked to say that, inasmuch as there were only two directors acting at that time, they had no power to bind the company. But it seems to me that I ought to hold, having regard to the authorities, that art. 42, which provides that a continuing council may act notwithstanding any vacancy, gets over the difficulty. I cannot see that those words ought to be limited to the case of filling up a vacancy, or to cases of emergency. To place such a construction on the article would, it seems to me, be altering the articles. It may be that the extraordinary result follows that, as regards outside persons, if there was only one director, he could act for the company. I suppose that result does follow, but I cannot help that. It seems to me, having in view art. 42, that the principle of *In re Scottish Petroleum Co.* (1) applies to the present case.

I also think that, there being nothing to inform Owen and Ashworth of the defects in the constitution of the board, probably it ought to be held on that ground that *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (2) and the principle of *Biggerstaff* v. *Rowatt's Wharf* (3) would apply, so as to entitle Owen and Ashworth to maintain their claim in point of law if in point of fact they could maintain it on the original deposit.

The same counsel appeared in Whitworth's claim.

Martelli, for the applicant. Having regard to the decision in Owen and Ashworth's claim as to the power of the two directors to bind the bank, it cannot be disputed that Lloyd's Bank had a good charge.

Wheeler, for the liquidator. I must admit that; but Whitworth, although he has paid off Lloyd's Bank, is not entitled to stand in its shoes, for he was one of the directors who acted

(1) 23 Ch. D. 413. (2) [1895] 1 Ch. 629.
(3) [1896] 2 Ch. 93.

for the company in the transaction with Lloyd's Bank and had knowledge that there was no quorum of directors.

Martelli. Whitworth, as transferee, is entitled to stand in the shoes of Lloyd's Bank.

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[The liquidator was unable to prove that the quorum of directors was ever fixed at three, and Whitworth's claim to prove was accordingly allowed.]

Solicitor for applicants: *R. H. Bentley.*
Solicitors for liquidator: *Carlisle, Unna, Rider & Heaton.*

F. E.

C. A. 1900 April 24, 25.

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[1896 N. 1719.]

Patent—Joint Grant—Survivorship—Sale—Agreement—Assignment—Covenants for Title—Construing Covenants as joint or joint and several—Deceased Grantee—Legal Personal Representative—Concurrence of, in Assignment—Practice—Action—Counter-claim—Separate Causes of Action—Appeal—Cross-notice—Cross-appeal—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 6.

In 1882 letters patent were granted to L. and J. in the then usual form of grant to two patentees, namely, to them, "their executors, administrators, and assigns," to the end that L. and J., "their executors, administrators, and assigns, and every of them" should have and enjoy the full benefit and sole use and exercise of the patented invention. This and other patents granted to L. and J. in the same form had been taken out with a view to selling them and sharing the profits of sale. By an agreement under seal made in 1883 between L. and J. of the one part, and the plaintiff company of the other part, the former agreed to sell, assign and transfer to the latter all the patents. Clause 7 thereof was as follows: "The assignment and transfer of the said letters patent . . . . shall be prepared by and at the costs of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of" the purchase-money, "and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned . . . . are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made." L. died in 1888, and after his death, the patents not having yet been assigned, though the purchase-money had, it was alleged, been paid, the company brought an action against J. and the administratrix of L., claiming (1.) an order on the defendants to assign the patents; (2.) damages for breach of the agreement and of the warranty therein contained; and (3.) repayment of part of the purchase-money on the ground that some of the patents had been declared invalid. L.'s administratrix then counter-claimed for payment by the company of a sum alleged to be due to her upon the agreement under a judgment pronounced by the French Court in an action brought against her in France by the company in 1889, the judgment being based upon the ground that as L.'s administratrix she had, under the agreement, separate rights against the company. At the trial of the English action and counter-claim, Cozens-Hardy J. dismissed both, [1899] 2 Ch. 289, 301, on

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the grounds (1.) that L.'s administratrix had no interest in the patents inasmuch as the interest created by the form of grant in each case was a joint interest only, so that J. took the whole by survivorship; and (2.) that the obligation created by clause 7 of the agreement was only a joint—not joint and several—covenant to assign the patents and to covenant in the assignment for their validity, and that therefore L.'s administratrix was not bound to enter into any covenant. On appeals by both the company and L.'s administratrix:—

Held, by the Court of Appeal, reversing the decision of Cozens-Hardy J., that the obligation created by clause 7 was that L. and J. had jointly covenanted to assign the patents, and that the assignment should contain joint and several covenants by them that the patents were valid, and that the company was entitled to relief against L.'s administratrix on that footing: also that L.'s administratrix was entitled on her counter-claim to have the amount alleged to be due to her under the French judgment ascertained.

A cross-notice under Rules of Supreme Court, 1883, Order LVIII., r. 6, by the respondent to an appeal can only be given in relation to the subject-matter of the action, and cannot be extended to some other matter not the subject of the action. For example, where an action and counter-claim founded on separate and distinct causes of action have each been dismissed with costs, and the plaintiff on the counter-claim appeals, it is irregular for the plaintiff in the action, that is, the respondent to the appeal, if he desires to appeal also, to give a cross-notice under Rules of Supreme Court, 1883, Order LVIII., r. 6. In such a case, the causes of action being separate and distinct, his proper course is to bring a cross-appeal and not to give a cross-notice.

THIS was an appeal from the judgment of Cozens-Hardy J. (1)

In May, 1889, the plaintiff company had commenced proceedings against the present defendant, Madame Ruelle, in the French Courts in Paris, to compel specific performance of the agreement of May 25, 1883, with damages for alleged breaches thereof, with the result that on June 2, 1897, the plaintiff company was ordered by a judgment of the Paris Court of Appeal to pay to Madame Ruelle under the agreement a sum of 2581*l.* 3*s.*, with interest, the company's claim for damages being dismissed.

Madame Ruelle having failed to deliver a defence to the present action, the plaintiffs on January 22, 1898, moved for judgment, but before the motion was disposed of the defendant submitted a draft defence and counter-claim. Upon the motion subsequently coming on for hearing before Stirling J., on

(1) [1899] 2 Ch. 289.

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March 25, 1898, he made an order giving Madame Ruelle leave to deliver her defence and counter-claim within three days; and the plaintiffs by their counsel admitting the counter-claim, except as to the sums therein mentioned, and both parties by their counsel consenting that copies and translations of the judgments of the French Courts might be accepted as evidence and that they would be bound by those judgments, so far as they established the validity or invalidity of the patents that were in question in the present action, it was ordered that no further pleadings should be delivered, but that the plaintiffs should be at liberty to set down the action for trial as a non-witness action.

Madame Ruelle then, on March 26, 1898, delivered a defence pleading that the plaintiffs' claim in this action was bad, on the ground that the questions arising under the agreement had been already, by the plaintiffs' election, submitted to the French Courts, were covered by the judgment of the French Court of Appeal, and were in fact res judicata; and she counter-claimed for payment of the 2581*l.* 3*s.*, with interest and damages, and also for accounts and inquiries.

As already reported, Cozens-Hardy J., at the trial of the action and counter-claim, gave judgment, on April 28, 1899, dismissing them both with costs.

The judgment was entered on May 29, 1899.

On August 29, 1899, the defendant, Madame Ruelle, gave the plaintiffs notice of appeal from that judgment so far as it ordered the dismissal of the counter-claim; and on October 24, 1899, the respondents, the plaintiffs, under the Rules of the Supreme Court, 1883, Order LVIII., r. 6, served the defendant with a cross-notice that upon the hearing of her appeal they would move that the judgment might be reversed so far as it ordered the dismissal of the action, and that the action might be referred back for trial with a declaration that the causes of action alleged in the statement of claim were several and not joint, and survived as against the estate of Gaulard and his legal personal representative.

The appeal, with the cross-notice, was heard on April 24, 1900. From the evidence read at the hearing of the appeal it

was clear that Gaulard and Gibbs were not simply co-owners of the patents granted to them, as would appear to have been the case having regard to the forms of the several grants—which were all in the same form as that of the English patent referred to on p. 291 of the report below—but that their object in taking out the patents was to sell them and to share any profits arising from sales.

Eve, *Q.C.*, and *Rowden*, *Q.C.*, for the defendant, Madame Ruelle. With regard to the plaintiffs' cross-notice, it is irregular and out of time. Order LVIII., r. 6, says that if a respondent intends upon the hearing of an appeal to contend that the decision of the Court below should be varied, he must give, in the absence of any special order (there was none here) an eight days' notice. That does not apply in the present case. The counter-claim on which we appeal deals with a totally different subject-matter to that of the plaintiffs' action, which is an action for damages for breach of an agreement; and it would be unfair now to allow the plaintiffs to raise by cross-notice a question which entirely differs from that raised by our appeal. If the plaintiffs were dissatisfied with the judgment of the Court below, they should have appealed in the ordinary way. By rule 15 of the above order the time for appealing from a final judgment is now limited to three months; so that, even if this cross-notice were to be treated as a definite appeal, the plaintiffs are altogether out of time.

Subject to this objection, we submit, on our appeal, that it is not now open to the plaintiffs to say that there is nothing due to the defendant; and we contend that we are entitled to judgment on the counter-claim to ascertain what is actually due to us. The questions arising under the agreement of May 25, 1883, are in fact res judicata, for the result of the French proceedings which were taken upon this very agreement was that we were entitled to be paid 2581*l.* 3*s.* as damages for breaches of it. Those proceedings were instituted by the plaintiffs themselves and, having selected a foreign tribunal for the decision of the questions arising out of the agreement, they cannot now turn round and say the judgment of the foreign Court is not

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binding: *Rousillon* v. *Rousillon* (1); *Schibsby* v. *Westenholz*. (2) The judgment of the Court below goes only to the survivorship of the liability under the agreement: it does not affect the separate cause of action we have on the finding of the 2581*l.* 3*s.* by the French Court.

Moulton, Q.C., and *Gore-Browne*, for the plaintiffs. As to our cross-notice, the decision of the learned judge below was in fact one decision on both the action and the counter-claim, and, therefore, an objection taken by one party to that decision gave the other party equally a right to object to the decision by a cross-notice.

[LINDLEY M.R. It is clear that the learned judge linked the action and counter-claim together. Under the circumstances, we think that the cross-notice may be treated as if it were a distinct notice of appeal.]

With regard to the contention that the question raised by the action is res judicata, that was not proved at the trial, nor was it so decided by the learned judge.

[They then proceeded to argue the main question discussed in the Court below—whether the obligation created by clause 7 of the agreement was merely a joint covenant by the patentees and vendors, Gaulard and Gibbs, to assign the patents and to covenant for their validity, or whether it was a covenant both joint and several by them so to do. Upon this question they contended that the plaintiffs were entitled to joint and several covenants from the patentees, so as to bind the survivor and the legal personal representatives of the deceased patentee, adopting the same arguments as at the trial. They also stated that under the French judgment the plaintiffs were entitled to claim under the agreement certain sums by way of set-off against the 2581*l.* 3*s.* claimed by the defendant; that they were entitled to an inquiry as to these sums; that until that inquiry was answered they were not bound to pay any part of the 2581*l.* 3*s.*; and that the purchase-money for the patents was not payable until the property was actually transferred: *Laird* v. *Pim*. (3)]

(1) (1880) 14 Ch. D. 351, 370. (2) (1870) L. R. 6 Q. B. 155, 161.
(3) (1841) 7 M. & W. 474.

Eve, Q.C., in reply, upon the construction of the agreement, adopted the same argument as was used on behalf of the defendant, Madame Ruelle, in the Court below.

Cur. adv. vult.

April 25. LINDLEY M.R. In this case I am unable, after consideration, to agree with the view adopted by the learned judge below, but I doubt very much whether the practical result of the view which we have adopted will be more beneficial to the parties than the view which he has adopted.

The question arises in this way. There were two patentees, Gaulard and Gibbs, who were entitled to various patents, including certain patents for England, for the distribution of electricity. It is quite obvious from what we have heard that they were not merely co-owners of these patents, but that they took them out in order to make money by selling them and sharing any profits which they might get out of them. These patents they agreed to sell to the plaintiff company by an agreement dated May 25, 1883. It was, in substance, an agreement to sell the patents for a very considerable sum of money. It is unnecessary to go into the details of the consideration. The agreement is important as regards one of its clauses, because the learned judge has taken what appears to me to be rather a short cut in dealing with the rights of the parties under the agreement. After clauses providing for the sale of the patents to the company, for the confirmation of them if required by the company, for the right to take proceedings in case of infringement, for advising the company as to the use of the inventions, and for the consideration payable by the company, we come to clauses 6 and 7, which relate to the method of carrying out the agreement by the vendors, Gaulard and Gibbs. By clause 6 they were to assign the patents to the company as the latter should direct; and then comes clause 7, which is very important, and which is in effect that the assignment and transfer of the patents shall be prepared by and at the cost of the company, and shall be expressed to be made in pursuance of the agreement, and in consideration of the payment of the consideration

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money; and that the vendors and all other necessary parties shall, at the cost of the company, execute such assignments to the company as they shall direct; "and such assignments respectively shall contain a covenant by the vendors that all the letters patent thereby assigned," or any substituted for them, "are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made."

Then there follows a proviso, which does not appear to be important, that the consideration may be apportioned amongst two or more assignments as the company shall think fit. That, I suppose, has reference to convenience of drafting, in case the company should require separate assignments of the several patents.

This 7th clause, to my mind, distinguishes this case, in principle, from the decision of the House of Lords in *White* v. *Tyndall* (1), upon which mainly the learned judge proceeded. He treated this agreement as neither more nor less than a joint covenant by Gaulard and Gibbs to assign these patents and covenant for their validity.

I cannot think that is the true construction, and the learned judge himself appears to have almost admitted it, because he said it might be that in a proper assignment the covenants for title would be joint and several. I have not the slightest doubt that they would and ought to be joint and several, and that the learned judge has gone too far in deciding the case upon the short ground that, the covenants being joint and Gaulard being dead, there was no remedy against his legal personal representative, Madame Ruelle, and that therefore the claim by the company against her failed and the company could only look to Gibbs, the survivor. It followed from that view that certain rights which Madame Ruelle set up in her counter-claim, and which were based upon the theory that the obligation created by the agreement was a joint and several covenant and that she had separate rights against the company, also failed.

(1) (1888) 13 App. Cas. 263.

Treating the covenant as joint only, the learned judge dismissed the action and the counter-claim. I cannot think that view is correct, and what we consider ought to be done is this: Reverse the judgment of the Court below, and declare that upon the true construction of the agreement of May 25, 1883, the right of the plaintiff company to relief against Madame Ruelle must be ascertained on the footing that Gaulard and Gibbs had jointly covenanted to assign the patents mentioned in the agreement to the company, and that such assignments should contain joint and several covenants by Gaulard and Gibbs with the company that such patents were valid and in nowise void or voidable; and declare that the amount due from the company to Madame Ruelle on her counter-claim must be ascertained upon the footing of the order of March 25, 1898. With these declarations the action and counter-claim are remitted for trial. The costs of the action and of the counter-claim, and of this appeal, including the costs of the plaintiff company's cross-notice, are reserved to be dealt with by the judge at the trial.

I wish to say one word upon the question of the plaintiffs' cross-notice. If the learned judge had not so linked the action and the counter-claim together as he did, and if the counsel in the Court below had not more or less acquiesced in that view, I should have thought—and I think my brothers agree—that the plaintiffs would have been wrong in giving their cross-notice as distinguished from bringing a cross-appeal, inasmuch as that cross-notice was addressed, not merely to the counter-claim to which the appeal was confined, but to the totally different matter of their right to relief upon their action, which is a separate and distinct matter altogether. But, having regard to the mode in which the two were linked together, we think that, in the circumstances of this case, the cross-notice ought to be treated, and we have accordingly treated it, as if it were a distinct notice of appeal. The "appeal" referred to in rule 6 of Order LVIII. is in this case the appeal by the defendant on her counter-claim; and reading the rule strictly and properly, the cross-notice could only be available in connection with the appeal from the order made on the counter-

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claim, and ought not to have been extended to a totally distinct matter—that is to say, to the relief sought by the plaintiffs on their claim. But as I have said before—and I am prepared to adhere to it—the circumstances of this case were so special by reason of the course taken, to which I have alluded, that we think it only just to treat the cross-notice as a cross-appeal, and we do so accordingly.

RIGBY and COLLINS L.JJ. concurred.

The material part of the order of the Court of Appeal, as drawn up, was in the following terms, in accordance with a memorandum handed down to the registrar by Lindley M.R. :—

"Upon motion, &c., by counsel for the defendant H. O. Ruelle, and upon hearing counsel for the plaintiffs, this Court doth order that the judgment dated 28th April, 1899, be discharged. And this Court doth declare that, upon the construction of the agreement dated the 25th of May, 1883, in the pleadings mentioned, the right of the plaintiff company to relief against the defendant H. O. Ruelle is to be ascertained on the footing that Messrs. Gaulard and Gibbs had jointly covenanted to assign the patents mentioned in the said agreement to the plaintiff company, and that such assignments should contain joint and several covenants by the said Messrs. Gaulard and Gibbs with the plaintiff company that such patents were valid and in nowise void or voidable. And this Court doth declare that the amount due from the plaintiff company to the defendant H. O. Ruelle on her counter-claim is to be ascertained upon the footing of the order dated 25th of March, 1898, in the said judgment mentioned. And it is ordered that this action and the said counter-claim be remitted for trial."

Solicitors: *Edward Betteley; Campbell, Reeves & Hooper.*

G. I. F. C.

In re SANITARY BURIAL ASSOCIATION.

C. A. 1900 May 22.

[No. 00132 of 1897.]

Company—Winding-up—Voluntary Winding-up—Supervision Order—Liquidator—Remuneration—Liquidator's Solicitor—Costs—Petitioning Creditor—Priorities—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 144, 151—*Companies Winding-up Rules*, 1890, *r.* 31.

Where a company has gone into voluntary liquidation and appointed a liquidator, and afterwards, on a creditor's petition for a compulsory order, a supervision order is made directing the petitioner's and liquidator's costs to be taxed and paid out of the assets, the liquidator's remuneration for the period from the commencement of the winding-up to the supervision order must be postponed to the taxed costs of the petitioner and of the liquidator's solicitor, and also to any further costs for work properly done by the solicitor by the authority of the liquidator subsequently to the order.

In re New York Exchange Co., [1893] 1 Ch. 371, considered.

THE Sanitary Burial Association, Limited, was a company incorporated under the Companies Act, 1862 to 1890.

On November 16, 1897, a petition for a compulsory winding up of the company was presented by a shareholder. On December 3, 1897, a creditor was substituted for the shareholder as petitioner. On December 8, 1897, the shareholders of the company held a meeting and passed a resolution for a voluntary winding-up, at the same time appointing one Ehrenfeldt liquidator at a remuneration to be determined at a subsequent meeting. On December 20, 1897, Wright J. dismissed the petition, but, on an appeal by the petitioning creditor, the Court of Appeal on March 25, 1898, made an order on the petition continuing the voluntary winding-up under the supervision of the Court. Under that order the voluntary liquidator was continued in office, and it was ordered that no bills of costs, charges or expenses, or special remuneration of any solicitor employed by the liquidator, or any remuneration, charges or expenses of such liquidator, or of any manager or other person, should be paid out of the assets of the company unless taxed and allowed by the registrar. The order then went on to direct taxation of the costs of the petitioner, of the

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company and of the liquidator in opposing the petition and consequent thereon, and of the order of Wright J., and payment of those costs, when taxed, out of the assets of the company; also taxation of the liquidator's costs of the appeal and payment of them out of the assets of the company. Under that order the petitioner's costs were taxed at 48*l.* 12*s.* 9*d.*, and the costs of the company and its liquidator at 117*l.* 15*s.* A Mr. Wingfield had acted as solicitor to the liquidator from the date of the latter's appointment on December 8, 1897, and in opposing the petition; and in the course of the liquidation he had, since the supervision order, obtained, under the liquidator's instructions, balance orders against several of the contributories. Under those balance orders Mr. Wingfield collected a sum of 133*l.* 11*s.*, but he did not hand this over to the liquidator inasmuch as his taxed costs, 117*l.* 15*s.*, of opposing the petition on behalf of the liquidator had not yet been paid, and there were also due to him further costs upon a bill delivered to the liquidator but not yet taxed, amounting to 147*l.* 14*s.* 11*d.*, these costs having been incurred since the supervision order.

On February 6, 1899, that is, subsequently to the date of the supervision order, the shareholders of the company held a meeting and passed a resolution which, after referring to the previous resolution of December 8, 1897, fixed the liquidator's remuneration for the period between that date—that is, when the winding-up commenced—and March 25, 1898, the date of the supervision order, at 55*l.* 4*s.* This sum the liquidator accordingly retained out of a sum of 150*l.* he had himself collected, having applied the remainder in payment of various expenses connected with the liquidation. His remuneration had not yet been assessed by the registrar.

There being thus insufficient assets for payment in full of the three amounts, namely, (*a*) the 48*l.* 12*s.* 9*d.*, the petitioning creditor's taxed costs, (*b*) the 117*l.* 15*s.*, the liquidator's taxed costs of the petition and due to his solicitor, and (*c*) the 55*l.* 4*s.*, the liquidator's remuneration up to the supervision order, a dispute arose between the liquidator and his solicitor, Mr. Wingfield, whether the liquidator's remuneration should take precedence over the costs of his solicitor. This question was raised

on a summons taken out by the liquidator on June 17, 1899, to compel Mr. Wingfield to pay into court the 133*l.* 11*s.* he had collected on his behalf. On August 2, 1899, Wright J. made an order on the summons to the effect that the 48*l.* 12*s.* 9*d.* was a first charge on the 133*l.* 11*s.*, and that the liquidator's remuneration, when assessed by the registrar, was payable out of the balance in priority to the 117*l.* 15*s.*

Mr. Wingfield appealed.

Eve, *Q.C.*, and *A. F. Peterson*, for Mr. Wingfield. We submit that, as between the liquidator and his solicitor, the latter is entitled to be paid his costs both before and after the supervision order in priority to the liquidator's remuneration for the period prior to the order. Sect. 144 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which deals with the costs of a voluntary winding-up, does not cover the point now in question. It says merely that "all costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims." Sect. 110 deals similarly with the costs of a compulsory winding-up; and under that section was issued rule 31 of the Companies Winding-up Rules, 1890, which gives the order of priority of payment out of the assets thus: (1.) the taxed costs of the petitioner, (2.) the remuneration of the special manager, if any, (3.) the costs and expenses of the person making the company's statement of affairs, (4.) the taxed costs of the shorthand-writer taking an examination, (5.) the liquidator's disbursements, (6.) the costs of any person properly employed by the liquidator, (7.) the liquidator's remuneration, and so forth. It is undoubtedly the rule in a compulsory winding-up that the remuneration of the liquidator is postponed to the costs of realization and of the liquidator's solicitor properly incurred in the winding-up: *In re Trueman's Estate* (1); and there is no reason why the rule should not be applicable to a voluntary winding-up. A voluntary liquidation merely substitutes the liquidator for the directors: the liquidator himself

(1) (1872) L. R. 14 Eq. 278, 281.

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never incurs any personal liability to his solicitor for costs: *In re Trueman's Estate* (1); and, therefore, his solicitor is entitled to be paid his costs in priority to any claim by the liquidator for remuneration: *In re Anglo-Moravian Hungarian Junction Ry. Co.* (2) In *In re New York Exchange Co.* (3), which was cited to Wright J., and on which he acted to a certain extent, Kekewich J. held that, where a supervision order had been made on a creditor's petition, the costs of the liquidator incurred previously to the order were payable in priority to the petitioner's costs of obtaining the order. We are not concerned in disputing the authority of that case, though it may, we think, be contended that the petitioning creditor's costs ought to take priority over everything else. However, that case does not deal with the question we have here, namely, whether the liquidator's remuneration before the order takes priority over the costs of his solicitor; in fact, it does not touch the question of remuneration at all. We contend further that the liquidator's solicitor is entitled to priority not only for his costs incurred before the supervision order, but also for his costs incurred since; we therefore submit to have the bill for 147*l.* 14*s.* 11*d.* taxed, and when taxed those costs, as well as the 117*l.* 15*s.*, must come before any remuneration of the liquidator. The authorities are clear that, where the liquidator has employed a solicitor to act for him in the liquidation, that solicitor is in all cases entitled to be paid his costs when taxed in priority to any remuneration the liquidator is entitled to receive. The priorities in the present case should, in our view, stand thus: (1.) the 48*l.* 12*s.* 9*d.*, (2.) the 117*l.* 15*s.*, (3.) the further taxed costs of the solicitor since the supervision order, and (4.) the liquidator's remuneration.

Muir Mackenzie, for the liquidator. I say that the liquidator's remuneration prior to the supervision order is in the same position as the costs of the liquidation and takes precedence over his solicitor's costs, and that the principle of *In re New York Exchange Co.* (3) applies.

[WEBSTER M.R. Is there any reason, in principle, why the

(1) L. R. 14 Eq. 278. (2) (1875) 1 Ch. D. 130.
(3) [1893] 1 Ch. 371.

scheme of priorities laid down in rule 31 of the Companies Winding-up Rules, 1890, should not apply to a voluntary winding-up under supervision?]

The rule applies, and is intended to apply, only to a compulsory and not to a voluntary winding-up; and that is clear from its reference to "the committee of inspection," a body unknown in a voluntary winding-up. Sect. 133 of the Companies Act, 1862, states the consequences that shall ensue upon a voluntary winding-up, one of which is that the shareholders shall appoint a liquidator and fix his remuneration; and by s. 144 all costs, charges, and expenses properly incurred in the voluntary winding-up, "including the remuneration," are to take priority over all other claims. Then s. 146 and following sections prescribe the proceedings for turning the shareholders' liquidation into a creditors' liquidation, which is governed by provisions entirely separate from those applicable to a voluntary liquidation. In a voluntary liquidation the liquidator takes the place of the directors and becomes the servant of the shareholders, who pay him his remuneration first and his solicitor's costs next. When a creditor intervenes and turns the liquidation into a creditors' liquidation, that ought not to alter the rights of the liquidator and his solicitor. After the supervision order the costs should certainly come behind the remuneration of the liquidator while acting as the servant of the shareholders. Wright J. has decided properly, I submit, that the remuneration comes before the costs of the liquidator's solicitor.

Peterson, in reply. Rule 31 is made applicable to a voluntary winding-up under supervision by s. 151 of the Act, which says that "any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes . . . . be deemed to be an order of the Court for winding up the company by the Court." That makes an order for a winding-up under supervision of the same effect as an order for a compulsory winding-up. Again, the shareholders cannot vote remuneration to the liquidator after the supervision order has been made, unless that is provided for by the order, which usually requires that the remuneration shall be approved by the

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registrar. Here remuneration was voted by the shareholders with the evident intention of bringing the case within *In re New York Exchange Co.* (1)

[RIGBY L.J. Ought not the costs to rank pari passu with the remuneration?]

I submit not.

WEBSTER M.R. In this case Wright J. has held, in effect, that a sum of 55*l.* 4*s.* due to the liquidator of the company, voted to him as remuneration in respect of the period of time during which the company was in voluntary liquidation before the order for liquidation under supervision was made, should have priority over the costs of the solicitor employed during the same period of time in connection with the liquidation and in opposing some of the steps undertaken to resist the supervision order being made.

I will now take the dates of the several proceedings. On December 20, 1897, the petition to wind up was dismissed by Wright J. On March 25, 1898, an order was made by the Court of Appeal that the voluntary liquidation should proceed under the supervision of the Court. That order itself does not give any direction as to the priority of payment of the costs or of the remuneration, but it gives directions—and, as I gather, the usual directions—with regard to the taxation of the costs of the liquidator's solicitor and of any remuneration that might be awarded to the liquidator. It appears that the costs of the petitioning creditor were taxed at 48*l.* 12*s.* 9*d.*, and the costs of the liquidator up to the supervision order at 117*l.* 15*s.*; and that since the date of the supervision order the liquidator's solicitor has got in, as the result it is stated of certain proceedings against contributories, 133*l.* 11*s.*, and the liquidator has collected, we are told, a somewhat larger sum —a sum of 150*l.*—out of which there remains in his hands, after payment of certain expenses, a sum of 55*l.* 4*s.*; and the result of Wright J.'s judgment is that, if the liquidator is entitled to keep the 55*l.* 4*s.* voted to him as remuneration, his solicitor will have to pay out of the moneys in his hands—that

(1) [1893] 1 Ch. 371.

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is out of the 133*l.* 11*s.*—the 48*l.* 12*s.* 9*d.* for the petitioning creditor's costs, whereas the liquidator will receive his remuneration in full up to the date of the supervision order, so that there will not be enough to pay his solicitor's costs. Therefore the question arises whether, as between the liquidator and his solicitor, there is any priority.

It seems to have been decided as far back as 1872 in *In re Trueman's Estate* (1), by Bacon V.-C., that, speaking generally, the solicitor in a voluntary liquidation had no claim against the liquidator personally but was entitled to be paid his costs in priority to any remuneration the liquidator might otherwise claim. I rather gather, from some observations of Mr. Muir Mackenzie in the course of his argument, that the practice has been, cæteris paribus, that if the period covered by the costs and remuneration be the same, the costs—and this is not disputed—come before the remuneration of the liquidator. It is said, however, that in this case, as there was a period of voluntary liquidation before the supervision order was made, the order which directs that the liquidator shall receive the 55*l.* 4*s.* and which throws upon the fund out of which his solicitor's costs must come the burden of bearing that 55*l.* 4*s.*, and also the costs of the petitioning creditor, is a correct order. In my opinion the liquidator's remuneration should come after the solicitor's costs, charges, and expenses properly incurred. The result of the decisions and the present state of the law appear to me to be this—that if the money recovered is not sufficient to pay the whole of the costs of the persons employed by the liquidator, the fund should go towards paying those costs before the liquidator can receive any remuneration.

I would call attention to rule 31 of the Companies Winding-up Rules, 1890, directing the order in which costs and other payments are to rank in the case of a compulsory winding-up. The scheme of priorities under that rule is in accordance with the principle I have stated, namely, that the costs, charges, and expenses properly incurred of the person who is employed by the liquidator to prepare the company's statement of affairs and to do other necessary work in the liquidation must come

(1) L. R. 14 Eq. 278.

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before the remuneration of the liquidator. I asked during the argument whether there was any reason on principle why that scheme of priorities should not apply to this kind of liquidation, and I was answered by Mr. Muir Mackenzie that the terms of the rule did not include this case, and that s. 133 of the Companies Act, 1862, gives the shareholders of a company the right to fix the liquidator's remuneration in a case of voluntary liquidation. I do not think that the right of the shareholders to direct a payment out of the assets can affect a question of priority which may arise in the liquidation between rival claimants on the same fund; and in this case it must be remembered that the resolution fixing the liquidator's remuneration in respect of the earlier period of the liquidation was not made until after the order of the Court for continuing the winding-up under supervision. I do not think that that is a conclusive test, but I think we ought to say that such a resolution passed at that time ought not to affect the rights of parties in respect of services rendered prior to the time of the supervision order being made.

I do not think that the order we now propose to make will be in any way in conflict with the decision of Kekewich J. in *In re New York Exchange Co.* (1) The question for decision in that case does not arise here; and it is only by attempting to extend the doctrine applied there to a different state of circumstances that it can be said that the decision in that case applies to what Wright J. has done here.

In my opinion the 117*l.* 15*s.*, being the taxed costs of the liquidator's solicitor up to the date of the supervision order, must come before any remuneration due to the liquidator up to that time. That will in all probability exhaust all the fund, but if it does not, then I think that in addition to that—if there are, in the bill for 147*l.* 14*s.* 11*d.* which has been delivered, any items for costs incurred in getting in the assets or for work properly done by the authority of the liquidator—those costs should also be paid before the liquidator's remuneration is paid.

But the substantial question here is whether the 48*l.* 12*s.* 9*d.*

(1) [1893] 1 Ch. 371.

due to the petitioning creditor should come out of the money in the solicitor's hands, and leave the 55*l.* 4*s.* free for the liquidator. In my opinion it ought not to be so paid, and that the liquidator's solicitor has a prior claim for his costs over the remuneration of the liquidator for the period before the supervision order.

RIGBY L.J. I am of the same opinion, and for the same reasons; and I do not think it necessary to repeat what has been said by the Master of the Rolls.

COLLINS L.J. I agree.

[The order of Wright J. was accordingly varied by declaring that the 117*l.* 15*s.*, and also any costs properly incurred by the solicitor at the request of the liquidator subsequent to the supervision order, took priority over the liquidator's remuneration; and the liquidator was ordered to pay the costs of the appeal.]

Solicitors: *W. J. Bernard Blew; Robinson & Stannard.*

G. I. F. C.

Dictum of SIR RICHARD WEBSTER, M.R., at p. 302, *applied.* THORPE *v.* FASEY. [1949] 2 All E.R. 393.

Applied. THORPE *v.* FASEY. [1949] Ch. 649

C. A. 1900 *May* 30.

CORNWALL *v.* HENSON.

[1898 C. 2425.]

Vendor and Purchaser—Repudiation of Contract by Purchaser—Purchase-money payable by Instalments—Omission to pay last Instalment—Right of Vendor to retain Instalments paid—Specific Performance—Damages.

The defendant in August, 1892, agreed to sell some land to the plaintiff for 150*l.*, of which 40*l.* was paid at the time, and the balance was to be paid by twelve equal quarterly instalments of 9*l.* 3*s.* 4*d.* each. In case of default for thirty days in the payment of any instalment, the whole of the unpaid instalments were to become immediately due and payable, and, in the event of default for thirty days in payment, the vendor was to be at liberty to resell the land, and to retain out of the proceeds of sale the unpaid instalments with interest, and was to pay the balance to the purchaser.

The purchaser went into possession under the contract, and retained possession for a considerable time, and, though generally in arrear with the instalments, he had by August, 1895, paid them all, except the last. The last instalment became due on September 29, 1895, but it was never paid. Correspondence took place, in which the vendor called on the purchaser to pay, but he never gave him notice that, if payment was not made within a specified time, he should treat the contract as abandoned. In October, 1896, the purchaser went away, and the vendor was unable to find him. The vendor resumed possession of the land and endeavoured to sell it, but without success, and in March, 1898, he agreed to let it for three years to a tenant, who took possession. In June, 1898, the purchaser reappeared, and wrote to the vendor that he was prepared to pay the final instalment. In July, 1898, the purchaser commenced an action against the vendor, claiming specific performance of the agreement of August, 1892, and damages in lieu of or in addition to specific performance:—

Held, that the plaintiff's conduct did not amount to a repudiation of his contract, and that the vendor was not justified in treating the contract as abandoned, and that, though the purchaser was not entitled to specific performance of his contract, he was entitled to damages, which the Court assessed at 125*l.*

Decision of Cozens-Hardy J., [1899] 2 Ch. 710, reversed.

APPEAL against the decision of Cozens-Hardy J. (1)

By an agreement dated August 11, 1892, the defendant agreed to sell and the plaintiff agreed to purchase five and a quarter acres of land at Pitsea, in Essex, for 150*l.*

(1) [1899] 2 Ch. 710.

Clause 2 of the agreement was as follows: "The purchaser has already paid to the vendor the sum of 40*l.* on account of the purchase-money of 150*l.*, and will pay the balance by equal quarterly instalments of 9*l.* 3*s.* 4*d.* each, on September 29, December 25, March 25, and June 24 in every year, the first of such quarterly payments to be made on December 25, 1892. The purchaser will also pay to the vendor, with each such quarterly payment on account of principal, such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for thirty days after the same shall have become due, the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable."

Thus far the clause was in print, but the following words were added in writing: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties."

By clause 3 the purchaser was to have possession as on July 1, 1892, and by clause 6 he was to make and maintain some boundary fences and hedges, and also to complete and repair part of a road abutting on the land. By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale the unpaid instalments, with interest, and the net balance of the proceeds was to be paid by the vendor to the purchaser.

The plaintiff entered into possession and cultivated the land for a considerable time, but he did not find it profitable. He was generally in arrear with the instalments of purchase-money, and from time to time the defendant allowed a post-ponement, interest being paid at 5 per cent. The last instalment paid by the plaintiff became due on June 24, 1895, and was paid with interest on August 27, 1895. This left only one

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instalment due, but no further payment was made by the plaintiff to the defendant.

A correspondence took place, in which the defendant called upon the plaintiff to pay. Ultimately letters addressed by the defendant to the plaintiff were returned through the Dead Letter Office, and inquiries made by the defendant failed in discovering the plaintiff. The land was in a derelict state, the fences were broken down, the road was not made, and the rates and tithe were not paid by the plaintiff. The land was not worth the total amount of the instalments paid by the plaintiff. Under these circumstances the defendant took possession of the land and advertised it for sale, and, not being able to effect a sale, he, on March 7, 1898, agreed to let the land to a Mr. Burns for three years, with the option to purchase at any time during the term. Burns was still in possession at the time of the trial of the action.

The plaintiff reappeared, and on June 13, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Some correspondence took place, but nothing resulted from it, and on July 13, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August 11, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract, or repayment of the money which he had paid, with interest. Cozens-Hardy J. held that the plaintiff's conduct amounted to a repudiation of his contract, and that he was not entitled to specific performance, or to damages, or to the return of his instalments, or to a lien on the land. The action was therefore dismissed.

The plaintiff appealed.

Astbury, Q.C., and *Harry Greenwood*, for the plaintiff, repeated the arguments which they had used in the Court below, and contended that the plaintiff had not repudiated the contract.

They referred to *Dinn* v. *Grant* (1); *Whincup* v. *Hughes* (2):

(1) (1852) 5 De G. & Sm. 451. (2) (1871) L. R. 6 C. P. 78.

Howe v. *Smith* (1); *Morgan* v. *Shaw* (2); *Rose* v. *Watson* (3); *Palmer* v. *Temple*. (4)

Frederic Thompson, for the defendant, argued that, as the plaintiff had had possession of the land under the contract, there had not been a total failure of consideration, and therefore the plaintiff could not recover the instalments which he had paid, and, as to his claim for damages, the contract had gone off by reason of his own default. He must be taken to have abandoned the contract, and the defendant was entitled to treat it as at an end. Clause 8 of the contract merely gave the vendor an optional remedy; his other legal remedies were left open to him. The plaintiff cannot recover damages for breach of contract unless he shews that he was ready and willing to complete his contract at the proper time, and that the vendor was not ready and willing to do so. The plaintiff has failed to prove both these things. [He referred to *Hunt* v. *Silk* (5); *Ex parte Barrell* (6); Sugden's Vendors and Purchasers, 14th ed. p. 40.]

H. Greenwood, in reply. Clause 8 was obligatory; the bargain was that that should be the vendor's remedy. Unless there was an absolute unqualified refusal by the purchaser to complete, the vendor had no right to sell except under clause 8. On the payment of each instalment there was in equity a proportionate vesting of the land in the purchaser: *Rose* v. *Watson* (3); *Palmer* v. *Temple*. (4) The defendant is endeavouring to treat the contract as at an end for one purpose while relying on it for another.

WEBSTER M.R. Cozens-Hardy J. has arrived at the conclusion of fact that in October, 1896, the plaintiff had shewn by his conduct that he had repudiated the contract, and that the defendant was justified in treating this as an abandonment by the plaintiff of his rights under the contract and in acting thenceforward as the true owner of the property both at law and in equity. If I could concur in that conclusion of fact, I

(1) (1884) 27 Ch. D. 89.
(2) (1817) 2 Mer. 138, 141; 16 R. R. 161.
(3) (1864) 10 H. L. C. 672.
(4) (1839) 9 Ad. & E. 508.
(5) (1804) 5 East, 449; 7 R. R. 739.
(6) (1875) L. R. 10 Ch. 512.

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should think that the judgment of the learned judge was right. But with the greatest respect to him I cannot arrive at that conclusion. [His Lordship stated the provisions of the contract, and continued :—]

It is said that clause 8 of the contract is entirely optional in favour of the vendor, and that he retained all the rights which he had independently of that clause. It is not, I think, necessary to decide whether that contention is well founded, for in the view which I take of the facts the vendor was not justified in treating the purchaser as having abandoned his contract. I think it is plain that the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned. [His Lordship reviewed the evidence, and continued :—]

I cannot find any intention on the part of the plaintiff to abandon the contract, or that any sufficient notice was given to him by the vendor that, if the last instalment was not paid within a specified time, the contract must be considered as at an end. I will not say that if the contract had been thus determined the vendor's only remedy would have been under clause 8, though I think that clause 8 was intended to operate in such a state of circumstances.

It is not necessary to deal with the question whether the plaintiff is entitled to a return of the instalments which he has paid, because he has not insisted upon that relief, but I feel very great doubt whether the doctrine of *Howe* v. *Smith* (1) would apply to a case in which the purchase-money was to be paid in instalments. In my opinion the defendant has dealt with the property in a way in which he was not justified in doing, and he is liable to the plaintiff in damages. We have been asked to assess the damages, and I think substantial justice will be done by awarding 125*l.* to the plaintiff.

RIGBY L.J. I agree with the Master of the Rolls as to the amount of the damages. Considering that the contract was for the payment of the purchase-money in a number of instal-

(1) 27 Ch. D. 89.

ments spread over a long period, that all the instalments but one were paid, and that the purchaser had possession of the property and was treated as the owner, I think that he had reasonable ground for believing that, notwithstanding the non-payment of the last instalment, he was still to be treated as the owner of the property. He may have intended to take more than a reasonable time in paying the last instalment, and he did in fact take so long a time as to disentitle him to specific performance of the contract. There are, no doubt, cases in which, whatever the intention of a purchaser may have been, the law will treat his contract as put an end to by reason of his delay. But I do not think that is so in the present case. And I think it is clear that the vendor had no idea of treating the contract as having been repudiated by the purchaser. Whether clause 8 of the contract merely gave an option to the vendor, or whether it pointed out his only remedy in case of the purchaser's default, I am not satisfied that the vendor had any intention of repudiating the contract. I cannot come to the conclusion that both parties or either of them intended to repudiate the contract.

COLLINS L.J. I am of the same opinion. It seems to me that the defendant's case must rest wholly on this foundation—that he was entitled to treat the acts of the plaintiff as amounting to a complete repudiation of all his rights and obligations under the contract. If the defendant cannot establish that, he must fail in his defence to the action. The law is clear that the breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract. Whatever doubt as to this may have arisen from a comparison of such cases as *Withers* v. *Reynolds* (1), *Hoare* v. *Rennie* (2), *Honck* v. *Muller* (3), and *Simpson* v. *Crippin* (4), has been set at rest by *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (5) The question was fully considered by the House of Lords in the latter case, and the law is now clear that the breach of one

(1) (1831) 2 B. & Ad. 882; 36 R. R. 782.
(2) (1859) 5 H. & N. 19.
(3) (1881) 7 Q. B. D. 92.
(4) (1872) L. R. 8 Q. B. 14.
(5) (1884) 9 App. Cas. 434.

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stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so if the circumstances lead to such an inference; but the further the parties have proceeded in the performance of the contract the less likely is it that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract, or his intention not to carry it out. In the present case the contract was performed by the purchaser with the exception of the payment of the last instalment of the purchase-money. There was no express declaration of his incapacity to make that payment, and the correspondence shews it was not likely the defendant would insist on immediate payment. The inference that under those circumstances the non-payment of an instalment of 9*l.* 3*s.* 4*d.* amounted to a repudiation by the purchaser of the whole contract would be so extravagant that I decline to draw it. Indeed, if the contract had contained an express stipulation that, on the non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty, and would have relieved him from it, as was done in *In re Dagenham (Thames) Dock Co.* (1) Indeed, the present case would have been a much stronger one, an instalment being only a twelfth part of the purchase-money. The defendant's case would have been substantially the same if only a shilling of the purchase-money had been left unpaid by the plaintiff. In my opinion the defendant is not entitled to say that the plaintiff has repudiated the contract, and it follows that the plaintiff is not debarred from suing the defendant for the non-performance of his stipulations, and he can obtain damages for the breach of them. I cannot agree with the learned judge that, because the plaintiff did not pay the last instalment of the purchase-money, he must be treated as having abandoned his contract. It is not necessary, therefore, to consider whether, even if the appellant could be said to have declared an intention not to pay the last instalment, and the vendor's reciprocal claim thereon is nothing short of what he would have got upon a complete rescission ab initio,

(1) (1873) L. R. 8 Ch. 1022.

namely, resumption of the land which formed the whole consideration moving from him under the contract, he is nevertheless entitled to retain the purchase-money; or whether in such a case the rights of the parties must not be adjusted upon the footing of a restitutio ad integrum: see *Clough* v. *London and North Western Ry. Co.* (1)

Greenwood asked that the plaintiff might be declared entitled to a lien on the land for the amount of the damages.

THE COURT declined to do this.

Solicitors: *Edwin, Son & Edgley; Field, Roscoe & Co., for J. H. Mitchell, Worthing.*

W. L. C.

SHAW *v.* HOLLAND.

[1897 S. 52.]

Company—Director—Misfeasance—Improper Allotment of Shares to Director at Undervalue—Measure of Damage—Practice—Appeal—Stay of Inquiries.

It being held that directors of a company had improperly allotted a large number of shares to themselves at an undervalue:—

Held, that the directors must account to the company for the profits which they had derived from the sale of such of the shares thus allotted as they had disposed of, and that as to the shares which they retained the proper measure of the damages was, under the circumstances, not the highest price at which any shares of the company had been sold during the period for which the directors had held their shares, but the market value of the shares at the dates at which they were respectively allotted to the directors, and that the directors must pay to the company the excess (if any) of that market value above the sums which they had paid to the company for the shares respectively.

Decision of North J. affirmed with a slight variation.

A stay of inquiries directed by a judgment pending an appeal will be granted only under very special circumstances.

APPEAL against a decision of North J.

The plaintiff was a shareholder in a company called the St. Helen's Development Syndicate, Limited, and he sued on

(1) (1871) L. R. 7 Ex. 37.

C. A. 1900 SHAW v. HOLLAND.

behalf of himself and all other the shareholders, except the defendants. The defendants were three directors of the company—Messrs. Frederick Catesby Holland, Charles James Tapp, and Emerson Bainbridge—and the company. The plaintiff sought to make the three directors liable for the profits which had been made by Tapp and Bainbridge in respect of a number of shares in the company which had been issued to them, or their respective nominees, either at par or at a premium of 10*s*. per share. Clause 88 of the company's articles of association provided: "If within three months of the incorporation of the company the first directors shall procure responsible subscribers for shares of 1*l*. each of the company, not exceeding 15,000 shares, they and their assigns shall have the option, at any time within two years of the incorporation of the company, to apply for from time to time and have allotted to them, or their assigns or their respective nominee or nominees, ordinary shares of 1*l*. each at par, but not more than the number of shares so subscribed for in the whole, and such allotment or allotments shall be made within seven days after the receipt of any such application for shares in the usual form duly signed. The said directors shall be entitled to the benefit of this option as between themselves in such proportions as they shall determine." Tapp and Bainbridge were two of the first directors of the company. Five thousand shares were issued to them respectively or their nominees, professedly in accordance with the provisions of clause 88, and further shares were issued to them or their nominees in pursuance of resolutions of the directors which gave Tapp and Bainbridge additional options to claim the allotment of shares at 10*s*. per share premium. The action was tried in June and July, 1898, and judgment was reserved on July 20, 1898, and was delivered on August 8, 1899. North J. dismissed the action as against Holland. He came to the conclusion that, as regarded the shares allotted under clause 88, Tapp had fulfilled the condition provided by that clause in respect of 3500 shares only, and that the other 1500 were improperly allotted to him. And in the same way he held that 2500 shares had been improperly allotted to Bainbridge. And his Lordship held that the resolutions

granting additional options were ultra vires and invalid, and that the shares allotted in pursuance of those resolutions were improperly allotted. And the learned judge made a declaration that the defendants Bainbridge and Tapp were jointly and severally liable to make good to the company all moneys received by those defendants or either of them, or by any other person or persons by the order or for the use of them or either of them, in respect of all the shares improperly allotted which had been disposed of by them respectively, or their respective nominees, in excess of the moneys received by the company in respect of the shares so disposed of, and that the same defendants were jointly and severally liable to pay to the company the excess (if any) of the market value, on July 20, 1898, of all shares improperly allotted which had not been disposed of by those defendants respectively, or their respective nominees, above the sums paid by the same defendants respectively to the company for and in respect of those shares. There was evidence that, after the allotments had been made to Tapp and Bainbridge or their nominees, some shares in the company had been sold at prices considerably higher than the amounts which those defendants had paid to the company for the shares so allotted.

In the course of his judgment North J. said: "I have been asked to fix the value of the shares for which the defendants are liable at the highest price at which any shares were sold during the periods in which these shares were held by Tapp and Bainbridge respectively or by their nominees, who were not bonâ fide purchasers, and *Eden* v. *Ridsdales Railway Lamp and Lighting Co.* (1) was relied upon. I do not see my way to go so far as that. The shares of the company were all in the hands of Tapp's firm and Barker & Co., the brokers; there were no other dealers in them; the quantity of shares held was very large, and careful and judicious treatment was essential, and it is absurd to suppose that they could all have been sold at any such prices as some small lots fetched. On the contrary, I have no doubt that, if they had all been thrown upon the market at once, they would have been unsaleable at

(1) (1889) 23 Q. B. D. 368.

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any price. The declaration which I propose to make seems to me the nearest method of arriving at what the company itself might have received if the unauthorized dealings in question had not taken place."

The defendants Tapp and Bainbridge appealed, and the plaintiff served a cross-notice by which he asked that, in lieu of the date July 20, 1898, fixed by the judgment for ascertaining the market value of the shares, there should be substituted the date at which shares in the company stood at the highest value in the market.

This report is limited to the question raised by the cross-appeal—namely, the proper measure of the damages to be paid by the defendants.

Eve, Q.C., Rufus Isaacs, Q.C., and *Norman Craig*, for the defendant Tapp.

Lawson Walton, Q.C., and *Ellis J. Griffith*, for the defendant Bainbridge.

Swinfen Eady, Q.C., and *J. H. Gregson*, for the plaintiff, upon the cross-appeal, contended that as the defendants stood in a fiduciary position to the company they ought to be charged by way of damages, in respect of the shares wrongfully allotted to them and not disposed of by them, with the highest price at which any shares of the company were sold during the period for which they held the shares so allotted to them: *Eden* v. *Ridsdales Railway Lamp and Lighting Co.* (1); *Hay's Case* (2); *McKay's Case* (3); *De Ruvigne's Case.* (4)

[RIGBY L.J. referred to *Williams* v. *Peel River Land and Mineral Co.* (5)]

Pearson's Case (6); *Weston's Case* (7); *Mitcalfe's Case* (8); *In re Postage Stamp Automatic Delivery Co.* (9); *Hirsche* v. *Sims.* (10)

Eve, Q.C., Rufus Isaacs, Q.C., and *Norman Craig*, for the defendant Tapp on the cross-appeal. If the allotment of the

(1) 23 Q. B. D. 368.
(2) (1875) L. R. 10 Ch. 593.
(3) (1875) 2 Ch. D. 1.
(4) (1877) 5 Ch. D. 306.
(5) (1886) 55 L. T. 689.
(6) (1877) 5 Ch. D. 336.
(7) (1879) 10 Ch. D. 579.
(8) (1879) 13 Ch. D. 169.
(9) [1892] 3 Ch. 566.
(10) [1894] A. C. 654.

shares was wrongful, it should be treated as wrong in its inception, and the value of the shares should be taken as at the time of their allotment: *Hirsche* v. *Sims*. (1) The proper measure of damages is the loss which the company suffered by reason of that being done which ought not to have been done. That which may have resulted from the voidable contract itself ought not to be taken into account. The real question is, What would the company have obtained for the shares at the time if they had been dealt with rightly instead of wrongfully? Otherwise the company, which is repudiating the contract, will to some extent retain the benefit of it.

Lawson Walton, *Q.C.*, and *Ellis J. Griffith*, for the defendant Bainbridge.

Swinfen Eady, *Q.C.*, in reply. In *Hirsche* v. *Sims* (1) the transaction was ultra vires; not one by which directors secured a benefit to themselves.

WEBSTER M.R., after stating the facts and expressing his concurrence with the decision of North J. as to the liability of the appellants, continued:—The cross-appeal at one time seemed to me to present a little difficulty. It was urged by Mr. Eady that all the shares in the hands of the defendants Bainbridge and Tapp should be taken at the very highest value which any shares in the company had ever touched at any sale in the market during the time in which those defendants were the holders of the shares. A number of authorities were cited to shew that the Court has always made wrong-doing directors pay the highest possible value of property which they have misappropriated. They were principally cases in which the question was whether the wrong-doer was to pay up the full nominal value of the shares, or was to get off by paying less than the full nominal value. North J. thought that the highest price ever obtained would not in the present case be a just measure of the damages. *Eden* v. *Ridsdales Railway Lamp and Lighting Co.* (2) was cited to him, and he was asked to put the value of the shares at the highest price of any shares which were sold during the period for which these shares were

(1) [1894] A. C. 654. (2) 23 Q. B. D. 368.

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held by the defendants. [His Lordship read the passage in the judgment of North J. stated above, and continued:—]

In my opinion North J. was right, subject to an alteration of date. I do not wish in any way to depart from the principle that a wrong-doing director, whether he be morally or legally wrong, should be made liable for the highest amount which could have been obtained for the property wrongly taken by him while it was in his hands. But I think that must be the amount which could have been obtained for the whole, and not merely for a portion of the property so taken. It would, I think, be unfair, at any rate when it is not suggested that the directors were guilty of any moral fraud, to press this rule harshly against them, and to charge them with that which was more than the real value of the property. I adopt the view of North J., that it would not be right to apply to large batches of shares the price which might have been obtainable for a small lot on a particular day. But there is one alteration which I think ought to be made in the judgment. North J. fixed the date when the trial ended—when he reserved judgment—as the date for ascertaining the value. I do not see why that date should be fixed. I should have thought the date of the commencement of the action or of notice to the defendants would have been more proper than the day of the end of the trial. But I think the true date is the day when the shares were improperly allotted under the options, because that was the time at which the wrong-doing directors acquired the property which ex hypothesi the company ought to have been able to realize for themselves. I think the order (not varying the measure of damage) should be varied by fixing the dates of the respective allotments of the shares as the dates for ascertaining their respective values.

The appeal must be dismissed, and the cross-appeal must succeed to the extent which I have indicated.

RIGBY L.J. No argument has been presented to us on the question of the validity or invalidity of clause 88 of the articles, and, so far as I can discover, no argument was brought forward in the Court below. But I must say that from the first I have

felt the gravest doubt whether clause 88 was within the powers of the company. I will say no more, because the point has not been argued; but I wish to guard myself against the supposition that I think that clause could be maintained. It is manifestly an attempt to run as close as possible to the line, and I have grave doubts whether it did not pass the line. [After expressing his concurrence in the dismissal of the appeal, his Lordship continued:—]

There remains the question as to the date at which the damage should be ascertained. I agree with the general rule that a wrong-doing director (and these defendants are plainly wrong-doers) ought to be made liable for any property of the company (such as shares) which has come into his hands wrongfully and is retained by him, and that he ought to be fixed with the highest possible price which the shares ever attained while in his hands. But we must not erect that rule into an absolute principle of law, and say, "If evidence is given of the sale of some shares at such a price during the period in question, it must be assumed that all the shares of the company, including those held wrongfully by the directors, might have been sold at that price." That would be going too far. You must consider the circumstances of the particular case, and I am not disposed to differ from the finding of the learned judge that it had not been shewn that the company ever could have obtained in respect of all the shares wrongfully held by the defendants the full price which was obtained in the market for some shares on a particular day. The number of shares held by the defendants was very large, and the throwing upon the market at any one time of all those shares might have influenced very greatly the price and brought it down considerably. In the cases cited it was very proper (if I may say so) to infer from the fact that certain shares were being dealt with (I think principally at par) that the shares held by the wrong-doers might also have been dealt with at par. There was not, as here, such an immense preponderance of shares as to lead to the conclusion that the dealing with the particular shares would substantially have altered the value of the shares in the market. As against a wrong-doer, it was quite right to assume under

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those circumstances that the shares held by him might have reached at a certain time a value which they had not at other times.

COLLINS L.J., after giving his reasons for concurring in dismissing the appeal, continued:—It has been urged that these directors being wrong-doers (as they unquestionably were) must be mulcted in damages measured by the highest price which shares of the company ever reached in the market while they held the shares of which they had wrongfully possessed themselves. The market value in such a case is merely a piece of machinery to ascertain the value of the thing. When there is a real market for the thing, the market price determines its value. The principle would be precisely the same whether there was a market for it or none at all. That which would have to be accounted for would be the highest value of the thing wrongfully taken. When there is a real market, in which the things in question can to any amount be exchanged and sold for money, then it is a short cut to the value to take the market price. But when these conditions do not exist, it is not a short cut to the value to take the price at which isolated lots could on given dates be sold. You would practically be applying to the shares a value which did not exist—a market value when in truth and in fact there was not a real market at all. The learned judge has found in effect that the value claimed was not the market value, because he said that if these shares had been put into the market in any quantity they could not have been sold at all. Under the circumstances, it would be very unfair to take what is an artificial and fictitious standard of value as the true value of the shares. I think that the time at which the damages are to be ascertained may be fairly taken as the time at which the wrong was done. The action is for damages, and in the present case I think it is exactly analogous to the common law action for conversion. It is true that the thing misappropriated is a chose in action—a share in a company. But, applying the standard to it, the period at which the defendants wrongfully obtained the chose in action was the time at which they procured it to be allotted to themselves. If

it were a chattel, unquestionably at common law that would be the period at which its value would have to be ascertained, and, although it is not a chattel, I can see no reason why the same principle as to the time at which the damages are to be ascertained does not apply. Therefore, I agree that the proper time for ascertaining the damages here is the date at which the shares were respectively allotted to the defendants.

June 27. *Rufus Isaacs, Q.C.*, and *Norman Craig*, for the defendants Tapp and Bainbridge, asked for a stay of the inquiries directed by the judgment pending an appeal to the House of Lords. The prosecution of the inquiries would be very expensive, and the expense might be wholly thrown away.

Swinfen Eady, Q.C., and *J. H. Gregson*, for the plaintiff, opposed the application, but said that his solicitor would give the usual undertaking to refund the costs paid to him in the event of the appeal being successful. Any money found due from the defendants under the inquiries could be paid into court and remain there until the appeal had been disposed of.

LORD ALVERSTONE M.R. The general rule, I think, should be that the proceedings under a judgment should not be stayed pending an appeal unless on special grounds. Of course, there are many cases in which the expense involved in inquiries might be so great, and the uncertainty as to the necessity of prosecuting them so great, that it would be desirable to stay the prosecution of the inquiries pending an appeal. But I think that in every case some special ground should be shewn upon any application to the Court for a stay. I am not satisfied that, if they are rightly undertaken, these inquiries as to the market value of the shares need be of any great length, and under these circumstances I do not think that any sufficient ground has been shewn for a stay of proceedings. I understand that Mr. Swinfen Eady raises no objection to the usual undertaking being given by his client's solicitor to repay the costs if the appeal should succeed, and that, if any money shall be found to be due from the defendants in pursuance of the

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inquiries as the judgment now stands, it shall be paid into court pending the final decision of the appeal. Under these circumstances we will make no order on the application.

RIGBY L.J. I am of the same opinion. Mr. Swinfen Eady has made a very reasonable concession, but I should have hesitated before attempting to force that concession upon him. I think that a stay of inquiries is very rarely needed, and should be granted only under very special circumstances pending an appeal. I do not find any such special circumstances here.

COLLINS L.J. concurred.

Solicitors: *Edwards & Cohen; Hores, Pattisson & Bathurst.*

W. L. C.

AINSWORTH *v.* WILDING.

STIRLING J.

1900

April 27; *May* 24.

[1890 A. 1085.]

Practice—Discovery—Production of Documents—Privilege—Bills of Costs—Correspondence between Solicitor and Client relating to Litigation—Records of Proceedings at Chambers—Rules of Supreme Court, Order XXXI., *r.* 19*a*.

Mere records of what takes place in chambers in the course of a hostile litigation in the presence of parties on both sides are not privileged from production. There is no distinction, for this purpose, between proceedings in chambers and proceedings in open court.

Correspondence which is protected on the ground of professional privilege is not rendered liable to discovery merely because it contains statements of fact as to what has taken place in chambers in the course of hostile litigation and in the presence of parties on both sides.

Where privilege was claimed for certain entries in bills of costs relating to litigation on the ground that they were copies of or extracts from notes or memoranda made by the solicitor pending the litigation for the purpose of enabling him to conduct the litigation on his client's behalf, and there was nothing in the affidavit by which privilege was claimed inconsistent with the entries being mere notes by the solicitor or his clerk of what had taken place in chambers in the presence of both parties, the Court exercised its discretion under Order XXXI., r. 19a, to open and inspect the sealed entries.

THIS was a summons raising the question whether or no certain documents were privileged from production.

The action, which was commenced in 1890, was originally brought by Thomas Ainsworth (who was now dead) against John Wilding, and John Smith (also now dead). The present plaintiffs were the legal personal representatives of Thomas Ainsworth. The object of the action was to take the accounts of the defendant John Wilding under a deed of charge on certain property dated October 7, 1877. Thomas Ainsworth claimed a charge on the same property by a deed dated February 8, 1879, and the main question between the parties was as to the basis on which those accounts were to be taken. There had been a prior action of *Smith* v. *Wilding* in which the late defendant John Smith, the mortgagor, was plaintiff, and which had been commenced before the late plaintiff Thomas Ainsworth obtained his charge. Ainsworth was the solicitor

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of Smith in that action. The defendant John Wilding and his brother Richard Wilding were also solicitors, and had formerly been solicitors and agents for Smith. By the judgment in that action it was ordered that the deed of October 7, 1877, should stand as security for what was due at that date from the plaintiff to the defendants on the balance of account of dealings and transactions between them, together with interest at the rate of 5 per cent. per annum from October 7, 1877. That judgment was prosecuted in chambers, and discussions and disputes arose there as to the proper mode of taking the account. Those transactions were down to a certain period carried on by Ainsworth as the plaintiff Smith's solicitor and on his behalf; but on July 29, 1879, after Ainsworth had obtained his mortgage, Smith changed his solicitor, and on August 4 a settlement of accounts took place, Ainsworth not being a party. In the present action Ainsworth and his legal personal representatives asserted that that settlement of account was not binding on them, and they claimed to have a proper account taken. The following defence was raised by paragraph 32 of the statement of defence: "No claim was ever put forward by or on behalf of the said Thomas Ainsworth or the plaintiffs until after the 23rd of November, 1894, that the accounts against this defendant ought to be taken upon the principle of a current account." To that, by the reply, the plaintiffs said, "that the question as to the account being continued as a current account after the 7th October, 1877, was raised on behalf of the plaintiff in 1878 in chambers on taking the accounts in *Smith* v. *Wilding*." To that the defendant Wilding rejoined: "If (which is denied) any such question as is alleged in paragraph 2 of the reply was ever raised in chambers on taking the account in *Smith* v. *Wilding*, or if the master gave any such direction as alleged in the said paragraph, such question was not raised and such direction was not given in the presence of this defendant and Richard Wilding deceased, or either of them." In an answer to interrogatories, the defendant John Wilding stated as follows: "Messrs. Milne & Co. acted as my solicitors in the action, and they wrote to me from time to time. They from time to time informed

me as to the attendances before the chief clerk." An affidavit of documents having been made in the usual way, on December 21, 1899, an order was made for a further and better affidavit, directing, amongst other things, that the defendant John Wilding do make and file a further affidavit stating whether he has or has had in his possession or power the several documents hereinafter mentioned referred to in the 2nd schedule "to a certain affidavit" thereby alleged to be in the possession or power of the said defendant, that was to say, "Messrs. Milne, Riddle & Mellor's bill of costs in the action of *Smith* v. *Wilding*, [1878 S. 39.], delivered to Messrs. Wilding & Son," and "correspondence consisting of letters and copy letters passing between Messrs Wilding & Son and their solicitors, Messrs. Milne & Co., all written during the progress of the said action of *Smith* v. *Wilding*, and relating to and for the purpose of the proceedings in that action, and do produce the documents which by such affidavits appear to be in his possession or power to the plaintiffs at the office of Messrs. Robbins, Billing & Co. aforesaid, except such as he may by such further affidavit claim to be privileged."

The defendant made a further affidavit, and set up the claim of privilege which was now in question. He objected to produce "such parts of the documents set forth in the first schedule as are sealed up or covered over, on the ground that the same (*a*) are copies of or extracts from memoranda or notes that were made by my solicitors, Messrs. Milne & Co., pending the action of *Smith* v. *Wilding* solely for the purpose of enabling them to conduct the said litigation on behalf of myself and my co-defendant Richard Wilding, and to advise us with reference thereto, or (*b*) do not relate to any matter in question in this action." That schedule comprised the bills of costs delivered by Messrs. Milne & Co. to Messrs. Wilding. He also objected to produce "The documents contained in the bundle of documents numbered 2 in the said 2nd schedule (correspondence passing between Messrs. Wilding & Son and their solicitors, Messrs. Milne & Co.) for the following reasons: The said correspondence consists of professional communications of a confidential character, such communications either consisting

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of professional advice given by my said solicitors to my co-defendant and myself with reference to the conduct of the said action of *Smith* v. *Wilding*, or having been made solely for the purpose of enabling my solicitors to conduct the said litigation in *Smith* v. *Wilding* on behalf of my co-defendant and myself, or to advise us with reference thereto."

The present summons was then taken out, asking that the defendant Wilding might be ordered to produce "such parts of the documents set forth in the 1st schedule to the same affidavit as are sealed up or covered over, and do not consist of legal professional confidential advice, but merely consist of statements of fact as to the proceedings in the action of *Smith* v. *Wilding* in the same affidavit mentioned, and (*b*) such or so much of the correspondence mentioned in paragraph 6 of the same affidavit as does not consist of legal professional confidential advice, but merely consists of statements of fact with reference to the proceedings in the said action of *Smith* v. *Wilding*."

Upjohn, Q.C., and *O. L. Clare*, for the applicants. The objection to produce the bills of costs cannot be sustained so far as they consist of mere statements of fact as to what took place in chambers. Statements of that kind are publici juris, and are not privileged: *Nicholl* v. *Jones* (1); *Goldstone* v. *Williams, Deacon & Co.* (2)

With regard to the correspondence, letters which consist of professional communications of a confidential character for the purpose of obtaining or giving legal advice are no doubt privileged; but these letters contain statements of what took place in chambers, and are excepted from the general rule: *Gardner* v. *Irvin* (3); *O'Shea* v. *Wood.* (4)

Butcher, Q.C., and *Austen-Cartmell*, for the defendant Wilding. It is not disputed that mere statements of fact, whether as to proceedings in court or otherwise, sent by a solicitor to his client are not privileged; but the inclusion of such statements in documents which are otherwise privileged

(1) (1865) 2 H. & M. 588.
(2) [1899] 1 Ch. 47.
(3) (1878) 4 Ex. D. 49.
(4) [1891] P. 286.

does not render them liable to discovery: Bray on Discovery, p. 372; *Minet* v. *Morgan*. (1)

In *Goldstone* v. *Williams, Deacon & Co.* (2) the depositions had been filed, and on that ground were held to be publici juris and liable to production. What passes in chambers is not, strictly speaking, publici juris: Annual Practice, p. 382.

Shorthand notes of proceedings in open court are no doubt not privileged, but there is no case in which notes of proceedings in chambers by counsel, solicitor, or a solicitor's clerk have been ordered to be produced: *Nordon* v. *Defries*. (3) There is no case which goes beyond the production of shorthand notes of proceedings in court except *Nicholl* v. *Jones*. (4) What was there required to be disclosed was the indorsement of counsel, and the Vice-Chancellor said that that was something in the nature of a record. He refused to allow anything else beyond the mere indorsement to be disclosed. The reason for disclosure was that the Court will sometimes act on such indorsements.

The correspondence passed between solicitor and client pending litigation and for the purposes of the litigation and is confidential in character. It is clearly privileged: *O'Shea* v. *Wood*. (5) A solicitor's bill of costs is his history of the transactions in which he has been concerned, and is privileged: *Chant* v. *Brown* (6); *Turton* v. *Barber*. (7) We do not, however, object to produce the bills as a whole, but we claim privilege for such parts as are sealed up, on the ground that they consist of memoranda or notes by the defendant's solicitors pending litigation, and for the purposes of that litigation. The Court will not exercise its discretion to inspect under Order XXXI., r. 19*a*, unless there is ground for suspicion that an invalid claim of privilege has been made: *Ehrmann* v. *Ehrmann*. (8)

Upjohn, Q.C., in reply. It is said that proceedings in chambers are not publici juris. The question was discussed in

(1) (1873) L. R. 8 Ch. 361.
(2) [1899] 1 Ch. 47.
(3) (1882) 8 Q. B. D. 508.
(4) 2 H. & M. 588.
(5) [1891] P. 286.
(6) (1852) 9 Hare, 790.
(7) (1874) L. R. 17 Eq. 329.
(8) [1896] 2 Ch. 826.

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Goldstone v. *Williams, Deacon & Co.* (1) The exclusion of the public from cases in chambers is merely a matter of convenience.

In *Rawstone* v. *Preston Corporation* (2) a transcript of shorthand notes of the evidence and arguments in an arbitration were ordered to be produced, and that is a stronger case than one of proceedings in chambers. Production is only refused in cases of a semi-private nature, of which *Learoyd* v. *Halifax Joint Stock Banking Co.* (3) is an example.

It is said that production will only be ordered in the case of a mere verbatim note of proceedings in court; but in *Nicholl* v. *Jones* (4) counsel's indorsement was directed to be disclosed.

A record or note of proceedings in court or in chambers is not privileged whether made by counsel or solicitor or solicitor's clerk: *In re Worswick.* (5)

Bills of costs are not necessarily privileged. They may contain entries which ought to be discovered: *Burton* v. *Dodd.* (6)

Cur. adv. vult.

May 24. STIRLING J. The application is based on the proposition that a mere record of what takes place in chambers in the course of a hostile action in the presence of parties on both sides is not privileged. It has been held that a shorthand writer's notes of what takes place in open court are not privileged: *Nicholl* v. *Jones* (4) and *In re Worswick.* (5) The same thing has been held as to the shorthand writer's notes of proceedings before an arbitrator: *Rawstone* v. *Preston Corporation.* (2) In *In re Worswick* (5) North J. says: "A mere verbatim report of the evidence, whether by the solicitor's clerk, the solicitor, or counsel, would not in my opinion be privileged." With that I agree. I am unable to see that for this purpose any valid distinction can be drawn between proceedings in open court and proceedings in chambers.

It is sought to obtain production (1.) of correspondence

(1) [1899] 1 Ch. 47.
(2) (1885) 30 Ch. D. 116.
(3) [1893] 1 Ch. 686.
(4) 2 H. & M. 588.
(5) (1888) 38 Ch. D. 370, 373.
(6) (1890) 35 Sol. J. 39.

between the solicitor and client, and (2.) entries in the solicitor's bills of costs. Somewhat different considerations apply to the two classes of documents.

The foundation of the privilege has been stated in many cases, and a very well known one is that of *Greenough* v. *Gaskell* (1), where the matter was very fully gone into by Lord Brougham L.C. He says (2): "It is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case." And in *Southwark and Vauxhall Water Co.* v. *Quick* (3) Cotton L.J. says: "Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen (by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers; and, for the purpose of having the litigation conducted properly, the law has said that communications between the client and the solicitor shall be privileged, and that no one shall be entitled to call for the production of a document which has been submitted to the solicitor for the purpose of obtaining his advice, or for the purpose of enabling him to institute or to defend proceedings. There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule." Now, the letters of which production is sought are sworn to be "professional communications of a confidential character, having been made solely

(1) (1833) 1 My. & K. 98; 36 R. R. 258. (2) 1 My. & K. 103.
(3) (1878) 3 Q. B. D. 315, 321.

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for the purpose of enabling my solicitors to conduct the said litigation in *Smith* v. *Wilding* on behalf of my co-defendants and myself. . . . ." It is said that a letter or a statement in a letter as to what had been done in chambers is not privileged on the ground already mentioned. I am unable to see why it is not. It may well have been, and I should infer from the affidavit, that the communication was made for the purpose of obtaining information or instructions from the client necessary for the conduct of the action. If I were to hold that such letters or statements were not privileged, it seems to me that I should be imposing on the free communication with his solicitor to which the client is entitled a fetter hitherto unrecognised in any authority. It seems to me to be contrary to principle that I should do so. I see no reason to doubt the statements in the affidavit, and I think that this portion of the summons must be refused.

I now come to the entries in the bills of costs. As a general rule a bill of costs relating to litigation actual or contemplated is privileged: *Chant* v. *Brown* (1) and *Turton* v. *Barber*. (2) No objection is, however, raised to the production of the bill of costs as a whole. The bill has been produced, but certain entries in it are sealed up: and privilege is claimed in respect of these entries on the following ground—"that the same are copies of or extracts from memoranda or notes that were made by my solicitors, Messrs. Milne & Co., pending the action of *Smith* v. *Wilding* solely for the purpose of enabling them to conduct the said litigation on behalf of myself and my co-defendant Richard Wilding and to advise us with reference thereto, or do not relate to any matter in question in this action."

In *Greenough* v. *Gaskell* (3), to which I have already referred, the Lord Chancellor said: "If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same

(1) 9 Hare, 790. (2) L. R. 17 Eq. 329.
(3) 1 My. & K. 102.

thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness." There has been some question whether in that passage the privilege is not stated somewhat too widely, but the discussion which has arisen is immaterial for the purpose for which I now refer to it. The important point for the present purpose is that notes or memoranda made by the solicitor are placed on the same footing as communications between the solicitor and the client.

Among the exceptions to the operations of the privilege these are stated by the Lord Chancellor in *Greenough* v. *Gaskell.* (1) He says (2): "So if you examine the cases in which the protection has been refused, until the late Nisi Prius cases (of which I shall presently speak more in detail), you will find that they all range themselves within one or other of the following heads, which are deducible from the proposition and in strict consistency with its terms. Those apparent exceptions are, where the communication was made before the attorney was employed as such, or after his employment had ceased; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend; or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases)."

The question as to the communications in respect of which privilege can be claimed was considered in *Kennedy* v. *Lyell* (3); and the exceptions from the rule were carefully discussed by Cotton L.J. He says (4): "I agree, however, that there is a

(1) 1 My. & K. 98; 36 R. R. 258.
(2) 1 My. & K. 104.
(3) (1883) 23 Ch. D. 387.
(4) Ibid. 404.

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difference between requiring a person to disclose reports as a whole, whether written or verbal, and requiring him to answer as to facts which he knows only from those reports. It is obvious that there is a distinction between the two cases, for the report as a whole would be certain to contain confidential advice and inferences drawn by the solicitor."

Then, after stating in language similar to that which he used in *Southwark and Vauxhall Water Co.* v. *Quick* (1) the ground of the privilege, he goes on to examine the authorities, and see in what cases the privilege is held not to apply. He says: "I have endeavoured to classify these cases," being "cases in which solicitors have been obliged to answer as to matters which they learnt while acting for their clients." "The first class," he says, "is referable to the principle that no communication made to a solicitor by or on behalf of the opposite party can be confidential." And, after giving a number of illustrations of that rule, he winds up by referring to *Ford* v. *Tennant* (2), where "a solicitor was required to give evidence of what had passed between him as solicitor of his client and a person with whom his client had a dispute." "That," says Cotton L.J., "was not confidential information, nor information obtained for the purpose of defending the client's title." Then he says: "There is a second class of cases"—namely, interrogatories inquiring only as to matters of fact, and he gives a number of examples of that, and he concludes by stating this: "Cases such as *Balguy* v. *Broadhurst* (3) seem to go on the ground that documents which the solicitor had obtained, although in his employment as solicitor, were, so to say, facts patent to the senses, and that as there was no ground of protection but that he had got them as solicitor for the purposes of the defence, they must be disclosed." Now, it seems to me that records of proceedings at chambers containing nothing else may be brought under both heads. They are proceedings which took place in the presence of the opposite party, and seem as much to fall within the exception as communications with the opposite party; and, again, they also may be said to be com-

(1) 3 Q. B. D. 321. (2) (1863) 32 Beav. 162.
(3) (1850) 1 Sim. (N.S.) 111.

munications as to matters of fact, because they are statements simply of what took place at chambers. This being the general law, let me turn to the affidavit. It is to be observed that there is a most remarkable difference in the language in which the privilege is claimed as regards these entries in the bills of costs and the correspondence. There is not a word in the affidavit that the memoranda or notes which are referred to are confidential. It is quite consistent with the affidavit that they may be of the character described by the Lord Chancellor in the second passage which I have just read from *Greenough* v. *Gaskell*. (1) They may, for example, contain a simple note by the solicitor or his clerk of the proceedings at chambers on the occasions as to which discovery is sought. I think that the affidavit does not sufficiently shew ground of privilege. But, for the sake of bringing the matter to a speedy conclusion, I have looked at two entries to which my attention was called in the second and shorter of the two bills of costs. One is October 31, 1878, and the other November 15. The first is headed "Attending junior clerk," and the other "Attending adjourned summons for discovery." Now, as regards the first, there is a portion of that which is covered up which in my judgment is clearly protected, but there is a portion of it which can be entirely severed from the rest, and consists of a simple statement of what took place at chambers. So in regard to the entry of November 15. It seems to me that too much has been covered up, and I should suggest, as the best way of dealing with the case, that the junior counsel for the defendant should examine the bills of costs, and I do not think he will have any difficulty in severing the portions which ought to be discovered from those which ought not.

Solicitors: *Bower, Cotton & Bower; Robbins, Billing & Co.*

(1) 1 My. & K. 98; 36 R. R. 258.

G. A. S.

STIRLING J.
1900
April 24, 25;
May 18.

In re THE TRUSTS OF THE ABBOTT FUND. SMITH *v.* ABBOTT.

[1900 A. 88.]

Resulting Trust—Fund raised by Subscription for Maintenance of Individuals—Death of Objects of the Fund—Unapplied Surplus—Resulting Trust for Subscribers.

Where a fund was raised by subscription for the maintenance and support of two distressed ladies, and, at the death of the survivor of them, a portion of the fund remained unapplied:—

Held, that there was a resulting trust of the balance of the fund for the subscribers thereto.

THE late Dr. Abbott, of Cambridge, who died in or about the year 1844, left ample means for the support of his family, some of whom were deaf and dumb. On January 4, 1889, the surviving trustee of Dr. Abbott's will died, and it was discovered that the whole of the trust funds (amounting to several thousands of pounds) belonging to the estate of Dr. Abbott had disappeared, and all attempts to trace the fund had been fruitless.

In 1889 and 1890 Dr. Fawcett, of Cambridge, collected a sum of 248*l.* 10*s.* 6*d.* on behalf of two members of the late Dr. Abbott's family, namely, Frederica Abbott and Katherine Abbott. Of the sum so collected, Dr. Fawcett placed 200*l.* upon deposit at a bank to the credit of an account headed, "The Abbott Fund." The balance was placed upon a current account which was headed, "The Abbott Fund, Treasurer, Dr. Rowland Morris Fawcett." No sums had been withdrawn from either of these two accounts at the date of Dr. Fawcett's death, which occurred in 1890. Neither the original nor a copy of the circular issued by Dr. Fawcett in making his appeal could be procured, but one of the subscribers stated in an affidavit made by him that "it was an appeal for assistance for the Misses Abbott only, and no proposition was made as to the disposal of the ultimate surplus if such there should be."

The form of receipt issued by Dr. Fawcett was in the following terms:—

"The Abbott Fund.

"Thanking you for your kind contribution of ———, I beg to inform you that the subscriptions are deposited at the bank of Messrs. Mortlock & Co., and will be disposed of under the advice of two friends of the family.

"I am yours obediently,

"R. M. Fawcett."

On June 18, 1890, the plaintiff, J. Hamblin Smith, issued the following circular: "The late Dr. R. M. Fawcett—always ready to help the distressed—collected shortly before his death the sum of 248*l.* 10*s.* 6*d.*, and placed it at the bank of Messrs. John Mortlock & Co. in an account called 'The Abbott Fund.' The circumstances which led Dr. Fawcett to make this collection were these." [The circular then stated the facts respecting the state and condition of the late Dr. Abbott's family and the loss of the trust funds to the effect above stated, and continued:—] "In consequence of this loss, the two survivors of the afflicted children have been entirely deprived of the provision so carefully designed for them by their father. The sum collected by Dr. Fawcett is quite insufficient to secure for these ladies a permanent means of support. I desire, therefore, to raise by annual subscriptions, supplemented from the Abbott Fund year by year, an amount which will enable Miss Frederica Abbott and Miss Katherine Abbott to reside in lodgings in Cambridge. The Abbott family have been so well known and so highly respected in the town, that I feel sure of obtaining subscriptions in Cambridge sufficient, with some help from friends at a distance and with assistance from the Abbott Fund, to provide for the very moderate wants of these two ladies. Donors to the Abbott Fund will learn from annual statements how far the fund is drawn upon from year to year, and thus they will know when a further appeal to their generosity may become necessary; many of them will, I believe, not wait for the appeal to be made. Annual subscriptions and further donations may be paid to me or to the account of the

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Abbott Fund, at Messrs. Mortlock's Bank, to which account I shall at once transfer the sums which I may receive. Annual subscriptions may be regarded as payable on the 1st of July. I shall suggest to the executors of the late Dr. Fawcett that the Abbott Fund shall be transferred by them to two trustees. These trustees must decide whether a portion of the fund shall be applied to purchase annuities for the ladies." To this circular was appended a list of the subscribers who had responded to Dr. Fawcett's appeal. Two contributed as "Anonymous," and one as "A friend."

Shortly after the issue of the circular the executors of Dr. Fawcett transferred the Abbott Fund to the plaintiff Smith and plaintiff Gross as joint treasurers. From 1891 to 1899 considerable sums were received in response to Mr. Smith's circular, and quarterly payments were made to the two Misses Abbott. Katherine Abbott died on April 24, 1899, and Frederica Abbott died on June 13, 1899. The defendant F. C. Abbott was their sole legal personal representative. There was a surplus in the hands of the plaintiffs of 366*l.* 13*s.* 9*d.*

The plaintiffs took out an originating summons, to which the defendant F. C. Abbott and one of the subscribers to the Abbott Fund were parties, to have it determined whether the subscribers to the Abbott Fund collected for the benefit of Frederica Abbott and Katherine Abbott were in the events which had happened entitled to the unapplied balance of the funds, or whether F. C. Abbott was entitled thereto as the legal personal representative of the two ladies, or, if not, how the same should be applied. The subscribers being very numerous, the subscriber who had been made respondent to the summons was appointed to represent the class.

When the case first came on for hearing, his Lordship desired further information upon the following points: (1.) Whether Mr. Smith's circular was sent to each of the donors to Dr. Fawcett's fund. (2.) Whether annual accounts were sent to those donors, shewing how much of the Fawcett Fund was applied for the benefit of the ladies. The plaintiff Smith accordingly prepared the following statement, in which he said: "(1.) The circular was sent to the majority of the donors,

but not to all. In the case of some, Mr. Smith did not know the address, and when two or more members of the same family had given a donation the circular was sent to one only. (2.) No statement how far the Fawcett Fund was drawn upon year by year was sent at any time to the donors. No further appeal to the donors was required. All the wants of the ladies were supplied, without assistance from the deposit account of the Abbott Fund, till the year 1899, when provision was necessary to a much greater amount for the comfort of Miss Katherine Abbott in her last illness."

G. Henderson, for the plaintiffs.

Peterson, for the defendant F. C. Abbott. The subscriptions of the various donors were intended to be absolute gifts. Those persons who contributed anonymously could never have intended to recall any part of their subscriptions. The money was subscribed for the benefit of the two ladies during their joint lives, and for the benefit of the survivor absolutely. The authorities relating to friendly societies have no application to the present case. In those cases the contributors to the funds are themselves the objects of the charity. The balance of the fund belongs to the estate of the survivor of the two ladies.

Brinton, for the subscribers. There is a resulting trust for the benefit of the subscribers and the representatives of such of them as are now dead. The object of the fund was to provide for the support of the ladies. That is inconsistent with the idea of giving them an interest which would pass to their trustee in bankruptcy. There was no intention on the part of the subscribers to benefit the relatives of the ladies, who might very well be in no want of assistance. The gift is in the nature of an executory trust, where the application of the fund is left to trustees, whose duty it is to carry out the intentions of the donor so far as they can: *In re Sanderson's Trust* (1); *In re Stanger* (2); *Cunnack* v. *Edwards* (3); *In re Printers and Transferrers Amalgamated Trades Protection Society*. (4)

(1) (1857) 3 K. & J. 497.
(2) (1891) 60 L. J. (Ch.) 326.
(3) [1895] 1 Ch. 489.
(4) [1899] 2 Ch. 184.

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Contemporaneous statements may be resorted to as evidence of the intention of the subscribers: *Attorney-General* v. *Clapham.* (1)

STIRLING J. The difficulty in this case arises from the fact that there is no declaration of trust. The case is one which not infrequently happens, as I have reason to believe. The late Dr. Fawcett, a gentleman well known in Cambridge, collected a sum of upwards of 248*l.* for the purpose of being applied for the relief of two ladies who were deaf and dumb. These two ladies had been provided by their father with ample means of livelihood, but had been deprived of it by the defalcations of a gentleman whom he had appointed a trustee. We have no information as to the terms on which this fund was handed over to Dr. Fawcett. After his death, which took place before 1891, the matter was taken up by a gentleman still living, the plaintiff Mr. Hamblin Smith. He issued a circular stating what had been done by Dr. Fawcett.

[His Lordship read the circular, and also the statement which had been made by Mr. Smith in answer to his Lordship's request for further information, and continued:—]

It seems to me, having regard to that statement, that I may treat the fund which was collected by Dr. Fawcett as really applicable to the same purposes, for that is the effect of it, as that which was subscribed in response to the circular issued by Mr. Smith. The ladies are both dead, and the question is whether, so far as this fund has not been applied for their benefit, there is a resulting trust of it for the subscribers. I cannot believe that it was ever intended to become the absolute property of the ladies so that they should be in a position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in the bankruptcy should be able to claim it. I believe it was intended that it should be administered by Mr. Smith, or the trustees who had been nominated in pursuance of the circular. I do not think the ladies ever became absolute owners of this fund. I think that the trustee or trustees were intended to have a wide discretion

(1) (1855) 4 D. M. & G. 591.

as to whether any, and if any what, part of the fund should be applied for the benefit of the ladies and how the application should be made. That view would not deprive them of all right in the fund, because if the trustees had not done their duty—if they either failed to exercise their discretion or exercised it improperly—the ladies might successfully have applied to the Court to have the fund administered according to the terms of the circular. In the result, therefore, there must be a declaration that there is a resulting trust of the moneys remaining unapplied for the benefit of the subscribers to the Abbott Fund.

Solicitors for plaintiffs: *Cole & Jackson, for Eaden & Spearing, Cambridge.*

Solicitors for defendant Abbott: *Abbott & Hudson.*

Solicitors for the other defendant: *Field, Roscoe & Co., for Ginn & Matthew, Cambridge.*

G. A. S.

BYRNE J.

1900

May 3, 5; *June* 19.

In re HAYES.
TURNBULL *v.* HAYES.

[1899 H. 3885.]

Will—Limited Power of Appointment—Will giving the Power dated subsequently to Will purporting to execute the Power — Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 24, 27.

H. H. the younger, by his will dated in 1884, gave all the residue of the property over which at the time of his death he should have a disposing power to trustees upon trust for sale and conversion, and directed them to pay the yearly income arising from his trust estate to his wife for life or widowhood.

H. H. the elder, father of H. H. the younger, by his will dated in 1893, empowered each child of his by his or her will, or any codicil thereto, to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share of his (the testator's) residuary estate for the life of such wife or husband, and directed that a sum of 4000*l.* thereby directed to be raised should be held upon the same or the like trusts and subject to the same or the like powers and provisions as were thereinbefore declared with respect to the share of H. H. the younger in the residue. H. H. the elder died in 1895, and H. H. the younger in 1899 leaving a widow and three children. H. H. the younger had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father:—

Held, that the will of H. H. the younger did not operate as a valid appointment under the power conferred upon him by the will of his father.

Stillman v. *Weedon*, (1848) 16 Sim. 26, discussed and considered.

SUMMONS for the determination of the question whether the will, dated December 29, 1884, of Henry Hayes the younger operated as a valid appointment under the power conferred upon him in that behalf by the will of his father, Henry Hayes the elder, dated June 10, 1893, to his wife of the whole income during her widowhood of the sum of 4000*l.*, and the share of residue by the will of the said Henry Hayes the elder settled upon trusts in favour of Henry Hayes the younger and his issue, and of an annuity of 50*l.* out of such income during the remainder of her life in case she should marry again.

Henry Hayes the younger, by his will dated December 29, 1884, after appointing trustees and executors and giving

pecuniary legacies to his wife and to his executors, proceeded as follows: "And subject to the payment of the said legacies I give all the residue of the property over which at the time of my death I shall have a disposing power unto my trustees upon trust in their discretion to sell and convert the same into money in such manner and upon such conditions as they shall think fit," and to invest the proceeds as therein mentioned with power to vary. "And I empower my trustees to continue the existing investments of my estate whether they shall be of the description hereinbefore authorized or not as they in their absolute discretion shall think fit. And upon further trust and I direct my trustees to pay the yearly income or produce arising from my trust estate unto my said dear wife for her life, if she shall so long continue my widow, for her own use absolutely. But in case my said wife shall marry again, then I direct my trustees to pay to her out of the income of my trust estate, in addition to the provision made for her by marriage settlement, an annuity of 50*l.* payable half-yearly, instead of the whole of such income." And, after a trust for maintenance and education of his children and a trust for accumulation of unapplied income, the testator directed his trustees to stand possessed of his trust estate subject to the trusts aforesaid upon trust for his children as therein mentioned, with an ultimate gift over in default of children living at his decease, or of children afterwards attaining twenty-one or marrying under that age.

The testator executed a codicil dated March 20, 1893, whereby he made a change in the persons to be trustees and executors, and in all other respects confirmed his will.

Henry Hayes the elder, the father of Henry Hayes the younger, made his will, dated June 10, 1893, and thereby empowered each child of his by his or her will, or any codicil thereto, to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in his, the testator Henry Hayes the elder's, residuary estate for the life of such wife or husband, or for any interest determinable on or before the death of such wife or husband; and by the same will Henry Hayes the elder directed that a sum of

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4000*l.* thereby directed to be raised should be held upon the same or the like trusts, and with and subject to the same or the like powers and provisions as were thereinbefore declared, expressed, and contained with respect to the share of his son Henry Hayes the younger in the residue as if the same were there repeated.

Henry Hayes the elder died on April 19, 1895, and Henry Hayes the younger died on September 8, 1899.

Henry Hayes the younger left a widow and three children. He had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father, and the question for determination was whether or not the power in question was well exercised by his will, which, together with the codicil, had been executed before the date of his father's will.

Henry Hayes the younger had a power of appointing in favour of issue under a settlement dated before his will.

D. D. Robertson, for the trustees and the infant child of Henry Hayes the younger. The special power contained in the will of Henry Hayes the elder has not been exercised by the son's will because that will is anterior in date to the will creating the power, and there is in that will no reference to the special power or to the property.

The instrument must refer either to the power or to the property subject to the power; or it must affect to deal with some property in general terms, not defining it under such circumstances that it cannot have effect except upon the property comprised in the power: Farwell on Powers, 2nd ed. p. 176.

It is a question of intention: you must gather from the document which is said to exercise the power an intention to exercise it, and I submit that in this case no intention is shewn.

If this had been a general power the case would be clear: *Stillman* v. *Weedon* (1); *Boyes* v. *Cook* (2); *Airey* v. *Bower*. (3) These decisions depend on ss. 24 and 27 of the Wills Act.

(1) 16 Sim. 26. (2) (1880) 14 Ch. D. 53.
(3) (1887) 12 App. Cas. 263.

Special powers are not mentioned in these sections, and s. 24 does not apply to limited powers.

There is no case directly in point, but *Cave* v. *Cave* (1) and *In re Wells' Trusts* (2) are decisions in my favour. [He also referred to *Hope* v. *Hope* (3), *In re Cotton* (4), and *In re Blackburn.* (5)]

Adams, for the widow of Henry Hayes the younger. I submit that the son's will was an effectual exercise of the power contained in his father's will, and that he has used words which will plainly exercise a future special power. The words "disposing power" are sufficient to exercise a special power, and the property dealt with comes within the words "property over which at the time of my death I shall have a disposing power": *Thornton* v. *Thornton* (6); *Price* v. *Price* (7); *In re Sharland* (8); *Von Brockdorff* v. *Malcolm* (9); *In re Milner* (10); *In re Denton.* (11) [He also referred to *Clogstoun* v. *Walcott* (12) and *In re Cotton.* (4)]

Robertson, in reply.

Cur. adv. vult.

June 19. BYRNE J., after stating the facts, proceeded as follows: It is clear upon the authorities that the 27th section of the Wills Act applies to general and not to special powers of appointment: see *Airey* v. *Bower* (13), *Boyes* v. *Cook* (14), and *In re Esther Williams.* (15) So far as the reasoning of Shadwell V.-C. in the case of *Stillman* v. *Weedon* (16) is founded upon the application of s. 27 of the Wills Act, such reasoning must be disregarded in view of later decisions.

It is also clear that the combined effect of ss. 24 and 27 of the Act is to enable a general power of appointment by will to be well exercised by a will executed prior to the date of the instrument creating the power.

(1) (1856) 8 D. M. & G. 131.
(2) (1889) 42 Ch. D. 646.
(3) (1854) 5 Giff. 13.
(4) (1888) 40 Ch. D. 41.
(5) (1889) 43 Ch. D. 75.
(6) (1875) L. R. 20 Eq. 599.
(7) (1882) 46 L. T. 228.
(8) [1899] 2 Ch. 536.
(9) (1885) 30 Ch. D. 172.
(10) [1899] 1 Ch. 563.
(11) (1890) 63 L. T. 105.
(12) (1843) 13 Sim. 523.
(13) 12 App. Cas. 263.
(14) 14 Ch. D. 53.
(15) (1889) 42 Ch. D. 93.
(16) 16 Sim. 26.

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Unless *Stillman* v. *Weedon* (1) is to be read as an authority to the contrary, I have been unable to find any case in which it has been decided that a special power of appointment by will can be well executed by a will dated prior to the creation of the power by virtue of the operation of s. 24 of the Act, and the opinion of Stirling J. in *In re Wells' Trusts* (2) and the actual decision of the Master of the Rolls in Ireland in the case of *Doyle* v. *Coyle* (3) are distinctly opposed to any such conclusion.

The case of *Stillman* v. *Weedon* (1) may perhaps be reconciled with the last-mentioned cases either upon the ground that, if specific personal property the subject of the power be referred to in the will, s. 24 of the Act applies, because that property may then be said to be comprised in the will, or (to use the interpretative words of Turner L.J. in *Lady Langdale* v. *Briggs* (4)), "so far as the will comprises dispositions of real and personal estate," or upon the ground that independently of the Act, if specific personal property the subject of the special power be dealt with by the testator, he must be deemed to have intended to exercise the only power enabling him to deal with it, although such power be created subsequently to the will.

I am not certain as to the precise view taken by Lord St. Leonards in Sugden on Powers, 8th ed. p. 307, s. 49, where he deals with *Stillman* v. *Weedon*. (1) Be this as it may, having regard to the opinions of Stirling J. and the Master of the Rolls in Ireland in the cases I have mentioned, I do not think that I ought to deal with the present case (there being no specific description of or reference to the property in question) upon the footing that, not being within s. 27, s. 24 of the Wills Act applies.

The difference in the result is, that I cannot start with any presumption in favour of an exercise of the power by reason of the general words of disposition, looking only to see if there be a contrary intention expressed, but that I must approach the consideration of the terms of the will as though the Wills Act had never been passed.

(1) 16 Sim. 26.
(2) 42 Ch. D. 646.
(3) [1895] 1 I. R. 205.
(4) (1856) 8 D. M. & G. 391, 436.

Acting on this view, and having in mind that the subject-matter is personal estate, and that such personal estate is not specifically mentioned or described in the will, bearing in mind also that the decisions in *In re Wells' Trusts* (1) and in *Doyle* v. *Coyle* (2) shew that I should have regard to the date of the will, I will refer again to the case of *In re Esther Williams* (3), a case dealing with the exercise of a special power over real estate, where Lindley L.J. says (4): "We must bear two things in mind. First, that s. 27 only applies to a general power of appointment as to which a general devise operates as an exercise of the power, unless there is some indication in the will of a contrary intention. Secondly, that, as regards special powers, the old law applies, which is that you must find some indication, either by reference to the power or by reference to the property, of an intention to exercise the special power. Anything which shewed that the testator had the power in his mind would be enough. But if you cannot find anything to shew the testator had the special power in his mind, it would be straining language to say that the devise would be an exercise of that power."

The subject-matter in the present case is personal estate, and, having regard to the old law before the Wills Act in reference to personal estate, I am unable to say that the property is so referred to as to shew an intention to exercise a specific special power afterwards to be created. Then I have to consider whether there is any sufficient reference to the power.

It is at least doubtful whether I am at liberty to have regard to the fact that the only power the testator could exercise in favour of his wife was the power in question. Even if I am, I find no reference to any specific limited power either existing or to be afterwards created, although I do find the intention expressed to dispose of all property over which the testator shall have at the time of his death a "disposing power" in favour of his wife to the extent of giving her a life interest.

(1) 42 Ch. D. 646.
(2) [1895] 1 I. R. 205.
(3) 42 Ch. D. 93.
(4) Ibid. 97.

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Notwithstanding the expression of an intention to dispose of all that the testator should at his death have a power to dispose of, and notwithstanding the decisions bearing upon the effectuality of some similar expressions as shewing a contrary intention in the cases of wills operated upon by ss. 24 and 27 of the Wills Act, I think, balancing as best I may the various considerations one way and the other, that the power has not in this instance been well executed. There are legacies given to the executors who are no objects of the power, there is a trust for sale and conversion, and there is the use of the expressions "my estate" and "my trust estate," the latter being repeated several times over. I find a general intention shewn to execute all powers of appointment and to benefit the widow, but upon the whole will I cannot find sufficient ground to enable me to hold her entitled as under an exercise of the subsequently created special power.

I should like to mention that in some of the text-books the actual discussion and decision in *Stillman* v. *Weedon* (1) has been treated as though it were only a reference to a general power. It is, however, clear to my mind that, rightly or wrongly, the Vice-Chancellor considered both ss. 24 and 27 of the Wills Act to relate to special powers, and that he was actually dealing with a case of special power.

I feel, therefore, bound to answer the question in the negative.

Solicitors: *Bell, Brodrick & Gray, for Buchannan & Sons, Whitby.*

(1) 16 Sim. 26.

G. M

BARRETTO *v.* YOUNG.

BYRNE J.

1900

May 30; *July* 3.

[Before 1852.]

General Power of Appointment—Power to be exercised by Will attested by two Witnesses—Donee of the Power a domiciled Frenchwoman—Holograph Will of Donee in French Language unattested.

A testator by his will dated in 1822 bequeathed the residue of his personal estate to trustees upon trust for his children in equal shares, the shares of such of them as were daughters to vest in them at twenty-one, but to be retained by the trustees upon trust to pay the income to such daughters for their lives, and, after the decease of each daughter, to pay the principal and the accumulation (if any) of the dividends "to such person or persons, upon such trusts and for such intents and purposes, as she by her last will and testament in writing, or any writing in the nature of, or purporting to be, her last will and testament, or any codicil or codicils thereto to be respectively executed by her in the presence of and attested by two or more credible witnesses, shall, notwithstanding her coverture, direct, or appoint, or give, or bequeath the same; and, in default of any such direction or appointment, gift, or bequest, unto such person or persons as at the time of her decease shall be her next of kin."

The testator died in 1824. The plaintiff, who was one of the daughters of the testator and a domiciled Frenchwoman, by her will dated in 1894, and two codicils dated in 1899, all in the French language and all unattested, made divers bequests, and died in November, 1899.

The will and codicils were admitted to probate, being good in accordance with French law, but invalid according to English law:—

Held, upon the petition of the surviving daughter of the testatrix, who claimed to be her sole next of kin, for payment out of a sum of bank stock standing to the account of the plaintiff, that the will of the testatrix did not operate as a good execution of the power contained in the will of her father, not having been executed in accordance with the formalities required by the will.

It is not enough where special formalities are required by the instrument creating the power that the instrument purporting to execute the power should be a will according to the law of domicil, but in cases where the provisions of the Wills Act do not apply the will must comply with the terms of the power.

In re Price, [1900] 1 Ch. 442, and *In re Kirwan's Trusts*, (1883) 25 Ch. D. 373, considered.

PETITION.

Joseph Barretto by his will, dated May 28, 1822, after making various bequests, gave the residue of his personal estate to trustees upon trust for sale and conversion, and to stand

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possessed of the investments and income thereof upon trust for all his children living at his death as therein mentioned in equal shares, the shares of such of them as should be daughters to be vested in them at twenty-one, but to be retained by his trustees upon trust to pay the income of such shares to such daughters during their respective lives for their separate use without power of anticipation, and after the decease of each such daughter "upon trust to pay, assign, and transfer the principal of her part or share and the accumulations (if any) of the dividends, interest, and annual proceeds thereof unto such person or persons, upon such trusts and for such intents and purposes as she by her last will and testament in writing, or any writing in the nature of, or purporting to be, her last will and testament, or any codicil or codicils thereto to be respectively executed by her in the presence of and attested by two or more credible witnesses, shall, notwithstanding her coverture, direct or appoint; and, in default of any such direction or appointment, gift, or bequest, unto such person or persons as at the time of her decease shall be her next of kin."

The testator died in October, 1824, leaving three children, of whom the plaintiff Emily Rosalia Paterson Barretto (afterwards Mrs. Guepratte) was one.

In pursuance of an order dated in 1865, made in the above suit, the one-third share of the above-named plaintiff in the testator's residuary personal estate was invested in the purchase of 977*l.* 2*s.* 3*d.* bank stock, and carried over to the account of the plaintiff Emily Rosalia Paterson Barretto, spinster, and the interest was by the same order directed to be paid during the life of Mrs. Guepratte to her and her husband, Henri Pierre Guepratte, on their joint receipt.

Henri Pierre Guepratte died in 1884, and by an order dated November, 1884, the interest on the bank stock was directed to be paid to Mrs. Guepratte during her life.

Mrs. Guepratte, who was a domiciled Frenchwoman, made a holograph will in the French language dated April 25, 1894, and thereby directed all her estate to be equally divided between her three children, Edouard, Mrs. Cambon, and the petitioner, Mrs. Elie Carmichael, and appointed her son-in-law, Paul

Cambon, and another executors. Among the different items of property mentioned and included in the will was the above sum of bank stock. The will was unattested.

The testatrix made a codicil dated March 1, 1899, also in the French language and unattested, whereby, having stated that she had lost her daughter Mrs. Cambon, she left to her son Henri Paul Cambon all that she had left to his mother in her will.

The testatrix made a further codicil, dated August 24, 1899, also in the French language and unattested, whereby, after stating she had lost her son Edouard, she left to his three daughters the share in money she had bequeathed to him.

Mrs. Guepratte died on November 5, 1899. Her will and codicils were admitted to probate, as being good in accordance with the law of the testatrix's domicil.

This petition was for payment out of the bank stock to the legal personal representative when constituted of Mrs. Guepratte, the petitioner claiming to be her sole next of kin, and the question was whether or not the will of Mrs. Guepratte, not having been attested by two witnesses, was a valid exercise of the power of appointment contained in the will of her father.

Levett, Q.C., and *H. B. Howard*, in support of the petition. The will of Mrs. Guepratte is not a valid exercise of the power contained in the testator's will, as it was not attested by two witnesses as prescribed by the power. The power is not the same as in *D'Huart* v. *Harkness* (1), where it was exercisable by the donee "by her last will and testament duly executed"; but here special formalities are prescribed which have not been observed. Neither the Wills Act nor Lord Kingsdown's Act (24 & 25 Vict. c. 114) applies to the will of a domiciled French subject. *Hummel* v. *Hummel* (2) and *In re Kirwan's Trusts* (3) are directly in our favour.

[They also referred to *In re Price* (4) and *Pouey* v. *Hordern.* (5)]

(1) (1865) 34 Beav. 324.
(2) [1898] 1 Ch. 642.
(3) 25 Ch. D. 373.
(4) [1900] 1 Ch. 442.
(5) [1900] 1 Ch. 492.

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Norton, Q.C., and *C. Bathurst*, for the respondents, Pierre Paul Cambon and Henri Cambon. The will is a valid execution of the power. The will is valid by the French law, and operates to dispose of all the testatrix's property, and shews a clear intention to exercise the power, and has been recognised as a valid will by having been admitted to probate. *D'Huart* v. *Harkness* (1) is a decision in our favour, for there the donee of the power, who was a domiciled Frenchwoman, had appointed the property by a will valid according to the law of her domicil which was unattested, but which was admitted to probate here, and it was held that the will was a valid execution of the power.

Where an intention is established to pass property which is the subject of a power, even although the power is not properly exercised, the Court will give effect to the intention of the donee: *Carver* v. *Richards* (2); *Hume* v. *Rundell* (3); *Morse* v. *Martin* (4); *Garth* v. *Townsend* (5); *Cooper* v. *Martin* (6); *Sneed* v. *Sneed.* (7)

[They also referred to Farwell on Powers, 2nd ed. p. 330.]

Levett, Q.C., in reply.

Cur. adv. vult.

July 3. BYRNE J. In this case a lady, being a domiciled Frenchwoman, made a will valid according to French law, but invalid according to English law, being unattested. The will has been admitted to probate, being a good will in accordance with the law of the testatrix's domicil; but the question I have to determine is whether or not it operates as a good execution of a general power of appointment created by an instrument coming into operation before the Wills Act. The power in question was a power to appoint "by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be respectively executed by her in the presence of

(1) 34 Beav. 324.
(2) (1859) 27 Beav. 488.
(3) (1822) 6 Madd. 331; 23 R. R. 232.
(4) (1865) 34 Beav. 500.
(5) (1869) L. R. 7 Eq. 220.
(6) (1867) L. R. 3 Ch. 47.
(7) (1747) Amb. 64.

and attested by two or more credible witnesses." So that the power was required to be exercised by an instrument attested in a special manner, which requirement was not satisfied by the instrument which is claimed to have operated as an exercise of the power, inasmuch as it was not attested by any witness.

The provisions of ss. 9 and 10 of the Wills Act have no application to wills of persons not domiciled in England. This was decided by Stirling J. in the case of *In re Price* (1), where he cites Dicey's Conflict of Laws, p. 684, and *Bremer* v. *Freeman* (2); and although in that case Stirling J. does not, I think, agree with what was said by Kay J. in *In re Kirwan's Trusts* (3) in reference to the application of the negative words in s. 10 of the Wills Act to the case before him, he at the same time points out that the decision in *In re Kirwan's Trusts* (3) may be rested on these grounds (4): "First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had no application, inasmuch as the testator was domiciled abroad: and although the instrument was not invalidated by the prohibitory portion of s. 10, it did not derive validity from the enabling portion of that section . . . . Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay J., that statute does not contain any enactment dealing with wills made in exercise of powers."

The power is not framed, as in *D'Huart* v. *Harkness* (5), so as to be exercisable by the donee by her last will and testament in writing duly executed, but requires execution with special formalities which have not been observed.

I am free from having to consider any question arising under Lord Kingsdown's Act, which relates only to the wills of British subjects; but it appears to me that, following the reasoning of Stirling J. in the case I have referred to, and of Kay J. in *In re Kirwan's Trusts* (3), apart from the special

(1) [1900] 1 Ch. 442, 451.
(2) (1857) 10 Moo. P. C. 306, 359.
(3) 25 Ch. D. 373.
(4) [1900] 1 Ch. 452.
(5) 34 Beav. 324.

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point in which Stirling J. does not agree with it, I must hold, in the case of the donee being a foreigner, that it is not enough, where special formalities are required by the instrument creating the power, that the instrument should be a will according to the law of domicil, but that in cases where the provisions of the Wills Act do not apply such will must comply with the terms of the power.

I am not aware of any authority which would justify me in supplying the defect in the execution of the power. Apart from other reasons, aiding the defect would not operate in favour of children of the donee.

Solicitors: *Lake, Shaw-Mackenzie & Co.*

G. M.

In re CHANT.
CHANT *v.* LEMON.

[1893 C. 2343.]

COZENS-HARDY J.

1900

May 29; *June* 1.

Will—Construction—"Die Unmarried."

The primary meaning of "die unmarried" in a will is "die without having been married"; but the expression is flexible.

The phrase "if he shall die unmarried and without leaving a child" held equivalent to "if he shall die without leaving a widow or child."

ANNIE MARIA CHANT by her will dated January 10, 1834, gave her residuary real and personal estate to trustees "upon trust at any time or from time to time to apply the whole or such part as my trustees shall think fit of the capital or the income or both for the personal maintenance and support or otherwise for the personal benefit of my brother Frederick Chant to the intent that my trustees may be enabled to adopt the disposition of the fund to the circumstances for the time being of my said brother and thereby to secure as far as possible his personal enjoyment thereof and prevent the same becoming the property of his alienees or creditors with power for my trustees to invest in their names so much of the said residue as shall from time to time remain unapplied in the public funds or on Government securities of the United Kingdom and from time to time to vary the investments and to accumulate the dividends. And I declare that so much of the capital income and accumulations as shall remain in the hands of my said trustees at the death of my said brother shall be held in trust for his children or child and be payable on their his or her attaining twenty-one years. But if he shall die unmarried and without leaving any children or a child who shall attain twenty-one years then I direct my said trustees to divide such trust fund remaining as aforesaid equally between the said Kitty Lemon and Sarah Hawkins."

Frederick Chant was now dead; he left a widow; he never had a child. This was a summons taken out by the personal

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representatives of one of the next of kin of the testatrix; the defendants were Kitty Lemon and Sarah Hawkins. The object of the summons was to determine whether the contingency on which the residuary estate of the testatrix was given to the defendants on the death of Frederick Chant had happened.

R. J. Parker, for the plaintiff. The primary meaning of the phrase "die unmarried" in a will is "die without having been married." The phrase, however, is flexible, and can be controlled by context: it sometimes means "die without leaving a husband" or "without leaving a wife," as the case may be. The secondary meaning will be attached in order to make a will consistent and reasonable. In this case sense can only be made of the context "and without leaving any children or child" by adopting the secondary meaning. The alternative that will be suggested is that "and" should be read "or." The Court will now only alter the language of a will in the last resort; even if the word "or" were substituted for "and" the language would not be natural, for the second alternative would include the first—in other words, there would be no real alternative. The event on which there was a gift in favour of the defendants has not taken place, and there is an intestacy: Theobald on Wills, 4th ed. 570; *Doe* v. *Danvers* (1); *Doe* v. *Rawding* (2); *In re Sanders' Trusts* (3); *In re King* (4); *Seccombe* v. *Edwards*. (5)

Ingle Joyce, for Kitty Lemon, and

Lightwood, for Sarah Hawkins. The Court leans against intestacy. Looking at the will apart from authority, we submit that the natural meaning of the phrase "die unmarried" is without having been ever married, and on the authorities that is so. In order to give full intention to the probable meaning of the testatrix, the Court will read "and" as "or." It is unlikely that where no interest has been given to the widow of the life tenant that the testatrix should have made a gift

(1) (1806) 7 East, 299.
(2) (1819) 2 B. & Al. 441; 21 R. R. 345.
(3) (1866) L. R. 1 Eq. 675.
(4) (1890) 62 L. T. 789.
(5) (1860) 28 Beav. 440.

dependent on the existence of a widow: *Dalrymple* v. *Hall* (1); *Clarke* v. *Colls* (2); *Wilson* v. *Bayly* (3); 1 Jarman on Wills, 5th ed. 484; *Hepworth* v. *Taylor* (4); *Maberly* v. *Strode* (5); *Bell* v. *Phyn* (6); *Mackenzie* v. *King* (7); *Long* v. *Lane* (8); *In re Sergeant* (9); *Grey* v. *Pearson*. (10)

R. J. Parker, in reply.

June 1. COZENS-HARDY J. (after stating the facts). The question is whether in the events which have happened there is an intestacy as to the residuary estate of the testatrix, or whether the property now belongs to Kitty Lemon and Sarah Hawkins. The answer to this question depends upon the meaning and effect of the words, "but if he shall die unmarried and without leaving any children, &c." My attention has been directed, and properly directed, to a great number of authorities, but I do not think any useful purpose would be served by attempting to reconcile them, or even to criticise them. My duty is to interpret this will, if possible to give full effect to all the words used by the testatrix, and not to change words merely because I think the change might result in a better or more reasonable will.

Now, it has been decided by authority which binds me that the word "unmarried," as applied to a man, primarily means, "without ever having been married," i.e., a bachelor, but that although this is the primary meaning of the word, apart from its context, there is a secondary meaning which the words may bear, namely, "not having a wife," i.e., being either a bachelor or a widower. The decision of the House of Lords in *Clarke* v. *Colls* (2) illustrates this. If I take the primary meaning, and treat the clause as equivalent to, "if he shall die a bachelor and without leaving any child," the latter words are, in one view, wholly useless, for a bachelor cannot have a legitimate child, or, in another view, they are only made sensible by reading

(1) (1881) 16 Ch. D. 715.
(2) (1861) 9 H. L. C. 601.
(3) (1760) 3 Bro. P. C. 195.
(4) (1784) 1 Cox, 112.
(5) (1797) 3 Ves. 450; 4 R. R. 61.
(6) (1802) 7 Ves. 453; 6 R. R. 148.
(7) (1848) 17 L. J. (Ch.) 448.
(8) (1886) 17 L. R. Ir. 11.
(9) (1884) 26 Ch. D. 575.
(10) (1857) 6 H. L. C. 61.

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"and" as "or," so that the clause would have this meaning, and "if he shall die a bachelor or, not being a bachelor, without having any child." If, on the other hand, I attach the secondary meaning to the word "unmarried," I do not fail to give effect to every word in the clause, which might then be paraphrased, "if he shall die without leaving a wife and without having a child," then the property is given over. Not a single word is altered. Full effect is thus given to every word in the clause. It is argued with force that no prior interest is given to the wife, and that therefore it is unreasonable to suppose that the gift over can depend upon there being no widow left. I do not think this sufficient to enable me to avoid the effect of the words used. There are many instances in which a gift over has reference to death without issue, even though no interest is given to such issue, and I cannot say that it is so unreasonable as to be absurd to make the gift over depend upon the death of the tenant for life without leaving a widow and without leaving a child who shall attain twenty-one.

The result is that in my opinion there is an intestacy, and I must declare accordingly.

Solicitors: *Geare & Pease; Rowcliffes, Rawle & Co.; Sole, Turner & Knight, for Blake, Reed & Lapthorn, Portsmouth.*

D. P.

In re NEWSPAPER PROPRIETARY SYNDICATE, LIMITED.
HOPKINSON *v.* NEWSPAPER PROPRIETARY SYNDICATE, LIMITED.

COZENS-HARDY J.
1900
June 16, 20.

[1898 N. 716.]

Preferential Payments in Bankruptcy Act, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-s.* 1 (*b*)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *s.* 3—"*Clerk or Servant*"—*Managing Director.*

A managing director of a company is not a "clerk or servant" within the meaning of the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1 (*b*).

THIS was a summons in a debenture-holders' action to determine whether James Kirby was entitled, as managing director of the defendant company, to a preferential payment up to 50*l.* in respect to arrears of salary. The debenture-holders were secured by a floating charge on the assets of the company, and a receiver had been appointed in the action.

James Kirby, in accordance with the articles of association of the company, by an agreement dated October, 1893, had been appointed managing director for three years at the annual salary of 600*l.* He continued to act down to the appointment of a receiver in the action. He never was paid any salary, and there was a large arrear due to him.

Martelli, for the claimant. By the Preferential Payments in Bankruptcy Act, 1888, a "clerk or servant" of a company is entitled to payment, in priority to other creditors, in respect of wages or salary in the winding-up of his company. By the Preferential Payments in Bankruptcy Amendment Act of 1897, the priority was extended to priority over a floating charge in favour of debenture-holders in case of the appointment of a receiver.

A managing director, such as the claimant, owes service to his company and is their servant. There is nothing in the Acts to draw a distinction between classes of servants; the only

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limit is as to the amount—50*l.*—in respect of which priority is allowed. A mate of a vessel has been held to be a servant: *Ex parte Homborg.* (1) So has a traveller engaged at an annual salary: *Ex parte Neal* (2); and the City editor of a newspaper: *Ex parte Chipchase.* (3) On the other hand, piece-workers of a coach-maker have been held not servants: *Ex parte Grellier.* (4)

Douglas, for the receiver. The statutory provision giving priority up to a small amount is intended to protect employees in a humble position. A director, whether an ordinary director or managing director, is not either clerk or servant of his company: he is an officer.

Martelli, in reply.

June 20. COZENS-HARDY J. This summons raises the question whether the managing director of a company is entitled, by virtue of the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in Bankruptcy Amendment Act, 1897, to receive a sum of 50*l.* in priority to the debenture-holders. The claim is made on the ground that the managing director is a "clerk" or "servant" of the company, and that "wages" or "salary" to an extent of 50*l.* were due to him. I think the claim cannot be supported. A managing director is certainly not a "clerk" of the company. Is he a "servant" of the company? This proposition was negatived by the Court of King's Bench in *Dunston* v. *Imperial Gas Light and Coke Co.* (5), where it was pointed out that a director is not a servant, but a manager; and in *Hutton* v. *West Cork Ry. Co.* (6) Bowen L.J., dealing with a case of a managing director, says (7): "A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms."

A managing director is only an ordinary director entrusted with some special powers. It is not relevant to say that he is

(1) (1842) 2 M. D. & De G. 642.
(2) (1829) Mont. & McA. 194.
(3) (1862) 11 W. R. 11.
(4) (1831) Mont. 264.
(5) (1832) 3 B. & Ad. 125; 37 R. R. 352.
(6) (1883) 23 Ch. D. 654.
(7) Ibid. 672.

entitled to remuneration by virtue of a special bargain, or that his remuneration is described as a salary. It is sufficient for me to say that he is not, within the meaning of the statute, a "servant" of the company. So far as I am aware, no such claim has ever been brought forward by a director.

I shall make no order on the summons except that the receiver do pay the costs of the applicant and retain his own costs, and be allowed them in passing his next account.

Solicitors for all parties: *Ward, Bowie & Co.*

D. P.

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May 29, 30.

MANCHESTER SHIP CANAL COMPANY *v.* MANCHESTER RACECOURSE COMPANY.

[1899 M. 3423.]

Contract — Illegality — Remoteness — Uncertainty — Statutory Confirmation — Contract to give "First Refusal" of Land—Interest in Land—Purchaser with Notice—Injunction.

An agreement scheduled to an Act of Parliament was thereby "confirmed and declared to be valid and binding upon the parties thereto."

Held, that every clause of the agreement had statutory validity, so that no objection on the ground of remoteness or uncertainty could be taken.

Sevenoaks, Maidstone and Tunbridge Ry. Co. v. *London, Chatham and Dover Ry. Co.*, (1879) 11 Ch. D. 625, and *Kent Coast Ry. Co.* v. *London Chatham and Dover Ry. Co.*, (1868) L. R. 3 Ch. 656, followed.

Caledonian Ry. Co. v. *Greenock and Wemyss Bay Ry. Co.*, (1874) L. R. 2 H. L., Sc. 347, *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1888) 40 Ch. D. 100, and *Reg.* v. *Midland Ry. Co.*, (1887) 19 Q. B. D. 540, distinguished.

A racecourse company agreed with a canal company that if it should be at any time proposed to use their racecourse for dock purposes the racecourse company should give the canal company the first refusal thereof:—

Held, (1.) A proposed user by any intending purchaser (including the canal company) entitled the canal company to a first refusal.

(2.) The racecourse company could not sell the racecourse without informing the canal company of the actual cash price the intending purchaser was offering, and offering it to them at that price.

(3.) The right of first refusal could be enforced against an intending purchaser with notice thereof on two grounds—namely:

(*a*) It was an interest in the land: *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562.

(*b*) While the matter rested in fieri, the Court, by an inverse application of the principle of *Willmott* v. *Barber*, (1880) 15 Ch. D. 96, could restrain the intending purchaser from accepting a conveyance of the legal estate in breach of his vendor's prior contract.

WITNESS ACTION.

The Manchester Ship Canal Company was incorporated under the Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), for the construction of a canal and docks, and the Manchester Racecourse Company was a limited company

whose racecourse adjoined the canal. Prior to March, 1893, there were certain disputes between the canal company and the racecourse company with reference to a variety of matters, and on March 7, 1893, an agreement under seal was entered into between the two companies in order to settle those disputes.

This agreement was scheduled to the Manchester Ship Canal (Surplus Lands) Act, 1893 (56 & 57 Vict. c. lxxiii.), whereby, after reciting that the companies had entered into the agreement, and that it was expedient that the agreement should be confirmed, which object could not be obtained without the authority of Parliament, the agreement was "confirmed and declared to be valid and binding upon the parties thereto."

The agreement was as follows: "An agreement made March 7, 1893, between the Manchester Racecourse Company, Limited (hereinafter called 'the racecourse company,' which expression shall include their successors and assigns where the context so requires or admits) of the one part, and the Manchester Ship Canal Company (hereinafter called 'the canal company,' which expression shall include their successors and assigns where the context so requires or admits) of the other part. In order to settle and determine certain disputes and differences subsisting between the racecourse company and the canal company it is hereby agreed as follows:—" . . . .

"3. If and whenever the lands and hereditaments belonging to the racecourse company, and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give to the canal company the first refusal of the aforesaid lands and hereditaments en bloc." . . .

"10. The racecourse company and the canal company shall respectively execute such deeds as may be required by the other of them for the purpose of giving effect to these presents, and the form of any such deed shall in case of dispute be settled by the senior conveyancing counsel for the time being of the Chancery Division of Her Majesty's High Court of Justice."

On August 10, 1899, the canal company informed the racecourse company of their intention to apply to Parliament for

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power to acquire the racecourse for dock purposes. Negotiations for purchase by private contract were at once commenced, during the course of which the racecourse company informed the canal company that they had been approached by other persons desirous of purchasing the racecourse.

On October 20, 1899, the racecourse company offered the property to the canal company for 350,000*l.* subject to conditions—(1.) that the racecourse company should have reasonable time to prepare for the continuance of their business on their site at Castle Irwell, and (2.) that the sale should be subject to the necessary licence being obtained for that purpose from the Jockey Club. The canal company were requested to state within a week whether or not the offer was accepted, and if not accepted to state the highest price they were prepared to offer for the property subject to the said conditions.

At the time of this offer the racecourse company were in negotiation for a sale to the Trafford Park Estates, Limited, hereinafter called the Trafford Park Company, but the price the Trafford Park Company were willing to give was not communicated to the canal company. The Trafford Park Company were then offering 250,000*l.*, together with an option of acquiring other land in Trafford Park and the benefit of a restrictive covenant into which they proposed to enter.

On October 30, 1899, the racecourse company informed the canal company that, as the canal company had not accepted the offer of October 20, or made any counter-proposal, the racecourse company felt at liberty to deal with the property as they thought fit.

On October 31, 1899, the canal company pointed out that the offer of October 20 was a conditional one, and stated that they were prepared to discuss price and conditions, and on November 4, 1899, they formally declined to entertain the offer of October 20.

On November 6, 1899, Wallis, the land agent of the canal company, told Davies, the chairman of the racecourse company, that he was authorized to offer 200,000*l.* Davies pressed for an offer of 250,000*l.*, but Wallis declined to go further unless Davies was in a position to settle. On November 7, 1899,

Davies, having consulted his co-directors, informed Wallis that 200,000*l.* could not be accepted, but he would submit any further offer to his co-directors. Wallis, who was unaware of the terms offered by the Trafford Park Company, said he could make no further offer, but if Davies would obtain authority to agree terms, Wallis was prepared to discuss the matter, as he was in a position to agree a price on behalf of the canal company.

On the same day, immediately after this interview, the racecourse company being informed by Davies that Wallis declined to increase his offer, arranged to sell the property to the Trafford Park Company on terms which were subsequently embodied in the formal agreement of December 22, 1899, below stated.

On November 8, 1899, the canal company issued a formal notice of their intention to apply to Parliament for power to take the racecourse for dock purposes, and at the time the action came on a bill for that purpose had passed both Houses, and was only awaiting the Royal assent.

By an agreement dated December 22, 1899, the racecourse company agreed to sell the property to the Trafford Park Company for 280,000*l.*, subject to the rights of the canal company under the agreement of March 7, 1893, the racecourse company to have an option at any time prior to June 24, 1902, to purchase 150 acres of land in Trafford Park from the Trafford Park Company suitable for a racecourse, and having not less than one mile on the straight, at 1500*l.* an acre, and the Trafford Park Company undertaking not to use or sell any land on their Trafford Park estate or elsewhere within fifteen miles of the Manchester Town Hall for the purposes of a racecourse prior to December 31, 1909.

The canal company, considering that the proposed sale was a breach of clause 3, brought this action against the racecourse company and the Trafford Park Company, and claimed an injunction to restrain the defendants from completing or carrying out any agreement for the sale and purchase of the racecourse in violation of clause 3, and in particular from carrying out the agreement of December 22, 1899. The

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defendants submitted that clause 3 was void for remoteness and uncertainty, that neither of the events therein mentioned had happened, that the canal company had in fact been given the first refusal, that their rights were expressly preserved by the agreement of December 22, 1899, and that in any case there was no cause of action against the Trafford Park Company.

The Trafford Park Company attempted to shew that the above option was worth 112,500*l.*, so that the cash value of their offer was always in excess of 350,000*l.*; but this point failed on the evidence. It was shewn that they proposed sooner or later to use the racecourse for dock purposes.

Moulton, *Q.C.*, *Swinfen Eady*, *Q.C.*, and *Clare*, for the canal company. Every clause of the agreement of March 7, 1893, has statutory validity, so that no objection on the ground of remoteness or uncertainty can arise.

The second event has happened, as both the canal company and the Trafford Park Company propose to use the land for dock purposes.

The canal company are, therefore, entitled to an unconditional offer at a cash price not exceeding that offered by other purchasers, and to be informed what price those purchasers are offering. This offer or information they have never received. The offer of October 20, 1899, was bad for want of this information, even if it had been unconditional, and even if the Trafford Park Company had been offering 350,000*l.* cash. The canal company could not in any case have given the same terms as those offered by the Trafford Park Company, and would not have been bound to give a cash equivalent at the racecourse or Trafford Park company's valuation of the option. The option was not in fact worth anything like 112,500*l.* The canal company were not bound to make an offer, and the fact that they offered 200,000*l.* and no more did not disentitle them to have the refusal of the property at a higher price.

The reservation of their rights is illusory. They were entitled to buy from the racecourse company, who could not sell subject to that right. The Trafford Park Company had notice of the

canal company's rights, and may be restrained from infringing them.

Warmington, Q.C., Hughes, Q.C., and *A. L. Ellis*, for the racecourse company. The Act of 1893, by confirming the scheduled agreement and declaring it to be valid and binding between the parties, merely gives capacity to the parties, and removes any objection on the ground of ultra vires. It does not give statutory validity to every clause of the agreement, nor does it require the parties to perform it. The agreement is, therefore, an ordinary agreement inter partes, and not a statute. It can be released, and it is otherwise subject to the general law of agreements: *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1); *Great Western Ry. Co.* v. *Halesowen Ry. Co.* (2); *Reg.* v. *Midland Ry. Co.* (3); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4) The agreement as a whole is no doubt valid, but clause 3 is void for perpetuity: *London and South Western Ry. Co.* v. *Gomm* (5); and, being quite unintelligible, it is also void for uncertainty. Suppose the racecourse company elect to cease using the land as a racecourse and to develop it as a building estate, or use it for dock purposes, they are to give the canal company the first refusal. First refusal of what? There is no provision that the racecourse company are to sell on either of the events, nor is there any price or mode of ascertaining a price fixed, and in the absence of that a right of refusal is unintelligible. How could the conveyancing counsel carry out clause 10 without some provision as to price? Again, the expression "the racecourse company" includes "their successors and assigns." The cesser of user as a racecourse or proposed user for dock purposes must, therefore, be a cesser of user or proposed user by the racecourse company, their successors or assigns, not by intending purchasers. Neither of these events has happened, so that clause 3 has not come into operation.

The suggestion that the racecourse company ought to get a firm offer from an intending purchaser, which can only be

(1) L. R. 2 H. L., Sc. 347.
(2) (1883) 52 L. J. (Q.B.) 473.
(3) 19 Q. B. D. 540.
(4) 40 Ch. D. 100.
(5) 20 Ch. D. 562.

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accepted if the canal company refuse to give the same terms, is impracticable. No purchaser would offer on that condition. It is not like an auction, where each bidder can go higher. The canal company refused the offer at 350,000*l.*, and subsequently declined to go beyond 200,000*l.* In any business sense they have had a "refusal."

If, however, they still have any rights, those rights are preserved. The canal company can no more restrain the present sale than a mortgagee can restrain a sale of the equity of redemption. If their argument is correct, they could even restrain a reconstruction of the racecourse company, as that would involve an assignment of the property.

Upjohn, Q.C., and *Stewart-Smith*, for the Trafford Park Company. The Trafford Park Company adopt the argument of the racecourse company.

[FARWELL J. referred to *Sevenoaks, Maidstone and Tunbridge Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (1) as to the effect of the Act of Parliament.]

In the *Sevenoaks Case* (1), s. 15 of the special Act provided: "The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act binding on the company and on the Dover Company." That made every clause part of the Act.

Again, the canal company treat clause 3 as a covenant against alienation. That cannot affect the Trafford Park Company.

[FARWELL J. referred to *In re Macleay.* (2)]

In that case there was a condition attaching to the land. Here there is at most a personal covenant, and no jus in rem. A personal covenant cannot be enforced against an alienee.

[FARWELL J. referred to *Tulk* v. *Moxhay.* (3)]

That was a negative covenant as to user, which is the only kind of covenant enforced against alienees: *Haywood* v. *Brunswick Permanent Benefit Building Society.* (4) This covenant does not relate to user, and it is positive, namely, a covenant to give the first refusal.

(1) 11 Ch. D. 625, 635.
(2) (1875) L. R. 20 Eq. 186.
(3) (1848) 2 Ph. 774.
(4) (1881) 8 Q. B. D. 403.

At the time of the offer of October 20, 1899, the Trafford Park Company were offering terms equivalent to over 350,000*l.* cash.

Moulton, Q.C., in reply. The right of refusal is really a right of pre-emption and affects the land: *London and South Western Ry. Co.* v. *Gomm.* (1) The Trafford Park Company could not get specific performance of their contract as it involves a breach of the canal company's contract: *Willmott* v. *Barber* (2); and by analogy, while their contract is in fieri they may be restrained from accepting the conveyance. A dealing with the legal estate was restrained in *London and County Banking Co.* v. *Lewis.* (3)

FARWELL J. The first point I have to determine is the effect of the Act of 1893. In terms it renders the agreement of March 7, 1893, valid and binding. Now, it has been argued that it merely gives the parties power to enter into the agreement, that is to say, it gives them a contracting capacity which they had not got before, irrespective of the terms contained in the particular contract. It appears to me that that would lead to a somewhat extraordinary result. If the Legislature has given the parties merely a right to enter into the contract and the contract is one which is altogether void, the Legislature has solemnly empowered them to enter into a contract which is void. That is a reductio ad absurdum. I cannot impute that intention to the Legislature. I think when the Act of Parliament confirms the scheduled agreement and declares it to be valid and binding upon the parties, it means what it says and gives it validity.

A second suggestion was that, though the agreement as a whole is valid, there may be an invalid clause or two which the Legislature has overlooked, and that sufficient effect is given to the declaration of validity if the majority of the clauses are held valid. That is an argument which I am wholly unable to accept. When the Legislature declares an agreement valid, it is valid in toto, and I am not at liberty to hold it partly invalid.

(1) 20 Ch. D. 562. (2) 15 Ch. D. 96.
(3) (1882) 21 Ch. D. 490.

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That disposes of the argument on the ground of perpetuity. In an agreement inter partes between these two companies clause 3 would be clearly void for perpetuity, because there is no limitation in point of time. In *Sevenoaks, Maidstone and Tunbridge Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (1) Jessel M.R. says: "I . . . . am by no means going to determine what the effect of the agreement would be if it were not enacted by Act of Parliament, and if it were merely a contract between individuals. An Act of Parliament has power to create interests which were unknown to the common law, and which could not be created between individuals by contract." Then he goes on to point out that the interest created by the scheduled agreement in that case was equivalent to a lease in perpetuity—a thing unknown to the law. It has been attempted to distinguish that case on the ground that the special Act there contained a provision that "The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act binding on the company and on the Dover Company." That appears to me to be a distinction without a difference. What Jessel M.R. meant was that if the Legislature adopts and gives validity to a contract, it does in fact make it valid, although if it were not for that confirmation and validation it would as a contract between the parties be absolutely void.

What I have said also extends to the case of voidness for uncertainty. If the Legislature has declared the contract valid, how can I declare it void? There is, of course, a greater difficulty here, because, although the Legislature has declared the contract intelligible, that does not necessarily enable me to comprehend it. I adopt the view expressed by Jessel M.R. in *In re Roberts* (2), where he says: "The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it." I think that applies a fortiori to an agreement which the Legislature has solemnly declared valid. Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound

(1) 11 Ch. D. 625, 635. (2) (1881) 19 Ch. D. 520, 529.

to find some meaning, and not to declare them void for uncertainty. The ground on which the Courts have declared a testator's will void for uncertainty really is that the testator was inops consilii, and it would be impossible for me to apply such a consideration as that to the Legislature of this country. In *Kent Coast Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (1) it was decided that a certain agreement was not ratified by casual references in subsequent Acts. The agreement was one which it would have been exceedingly difficult to deal with, because there was apparently no completed or final agreement at all. In delivering the judgment of the Court, Wood L.J. says: "Having come to this conclusion, we conceive that, properly speaking, there can be no confirmation of an agreement which had no validity, either in form or substance, at the date of the subsequent Acts of Parliament on which the plaintiffs have relied as concluding the defendants. It would require a very clear and explicit enactment reciting or distinctly referring to the imperfect contract, creating, in fact, a new parliamentary engagement between the parties to the attempted agreement." His Lordship apparently thought, therefore, that though the agreement had no validity either in form or substance, yet if there had been an explicit enactment confirming it, the Court would have had to give some effect to it. I, therefore, feel bound to give some effect to this agreement, although it may to some extent require a certain expansion of the language used.

A great deal of argument was founded upon *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (2). But the problem before the Court in that case and subsequent cases of the same nature was absolutely different to anything I have to solve. The question was not whether the parties were or were not bound by the contract into which they had entered. No such question arose. The question was whether the Courts were bound or not by a substantive statutory enactment, presumably in the interests of the public, that the agreement which was confirmed between the parties should be implemented and made effective by the parties. Of course, if the Legislature says to the parties, "Not only do we declare the agreement

(1) L. R. 3 Ch. 656, 667. (2) L. R. 2 H. L., Sc. 347.

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valid between you, but you shall perform it," then there is a statutory enactment over and above the agreement validated between the parties, which enactment the Attorney-General could probably enforce, or to which, at any rate, the remedy by mandamus would apply. The parties might waive the agreement between themselves for their own benefit. They could not waive the statutory duty imposed upon them, if it were a duty imposed for the benefit of the public at large. That was the question considered in all the cases cited for the defendants on this point. In *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) Bowen L.J. says: "It seems to me that the object of the Act was to remove the difficulty with regard to railway companies which up to that moment had existed, and to leave it in the power of railway companies to agree between themselves, if they so chose, that their disputes should be referred to arbitration, and that either party should have the right to enforce that agreement against the other party, and to prevent the party who sought to depart from it from having recourse to the courts of law in the face of the bargain that arbitration should be the proper tribunal." That is to say, it gave power to the two railway companies to enter into a contract which was rendered a valid contract as between themselves. The Lord Justice goes on: "But that seems to me to be nothing more than legislation which places it in the power of railway companies to insist upon that contractual right as against each other, if they choose to make a bargain to that effect, and to fall far short of legislation which debars the Courts of this country from deciding disputes between railway companies if the railway companies themselves do not choose to insist upon the arbitration clause in their agreement." That is to say, if the Legislature enacts in terms, "You must arbitrate; we do not merely confirm the agreement you have come to that you will arbitrate, but ultra that we say that you shall arbitrate," the companies cannot waive that. The Courts would be bound to take judicial cognizance of the statutory enactment. It was held in the particular case that the enactment did not amount to that; and that the Court was at liberty to consider the question raised between the parties, not-

(1) 40 Ch. D. 100, 108.

withstanding the arbitration clause which had been confirmed and rendered valid by the Act of Parliament. No question arose as to whether the contract was or was not valid as between the parties themselves. The same observation applies to the other cases, especially *Reg.* v. *Midland Ry. Co.* (1), which was merely a question on the construction of a particular Act of Parliament, with which I need not deal further. It was exactly the same case raising the same point, which I have just suggested. I, therefore, find myself in this position. I have an agreement which the Legislature has declared valid, and I have to construe it. In so doing I must avoid, of course, coming to any conclusion which would render it void for uncertainty. I must, therefore, find, if possible, a meaning for the words used.

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Now, having regard to the way in which *London and South Western Ry. Co.* v. *Gomm* (2) was decided, it is plain, I think, that the words used in clause 3, although inartistic, may give an interest in the land in the sense that they may be construed so as to limit a use to arise on an event in the future very similar to the use suggested to be raised in *Gomm's Case.* (2) *Gomm's Case* (2) was also a case of an option of pre-emption, in that case at a price named. In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person.

The object of the parties obviously was this. While the racecourse is used as a racecourse it does not compete with the canal company's business; so it does not matter to them how long it remains in that position. If it ever ceases to be a racecourse, then the provision arises that the canal company are to have the option to purchase it. That particular event has not happened. The second event is: "Should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes." It has been argued that that means "proposed by the racecourse company, their successors or assigns," who do not propose to do anything of the sort. But I see no reason for limiting the words in that way. The clause is in general terms. And it appears to me that if the lands are proposed to be used for dock purposes by the canal company, there is nothing

(1) 19 Q. B. D. 540. (2) 20 Ch. D. 562.

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unreasonable in holding that the contract means that in that case they are to have the right to buy at the same price as anybody else is willing to give. It does not appear to me that it does any injustice to the racecourse company to say to them, "Granted that you get the same sum, you shall prefer the canal company to the outside purchaser."

It is clear that the canal company propose to use the property for dock purposes. I also hold as a fact that within the meaning of this clause the Trafford Park Company also propose to use it for dock purposes, not immediately, but, for anything that appears, next month or next year. No limitation in point of time is stated in the scheduled agreement, and it appears to me, therefore, as a question of fact, that the condition precedent has been performed, and that the right of the canal company to have the first refusal has arisen. Then comes the question as to the meaning of the words, "the racecourse company shall give to the canal company the first refusal of the aforesaid lands and hereditaments en bloc." Now, a refusal, to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered. I am therefore of opinion that the racecourse company are bound to make an offer to the canal company of the property, and this they have not done. It is clear that they never made any offer at all, but, on the contrary, refused to do so, and desired the canal company to make an offer on their part. Further, I hold that the refusal really means a refusal not of an offer at any price that the racecourse company choose to ask, but a refusal of an offer at the price which some other person is willing to give. It was argued that the very fact that there had been negotiations between the racecourse company and the canal company with a view to a sale, irrespective of any offer by any third person, shewed that the canal company had had the offer made to them, and had refused it. In my opinion, that is not the true meaning. It may very well be that the owner of an option of this sort may be unwilling to give more than a certain amount so long as the land remains in the hands of the person bound by the option, and he is not proposing to sell to anybody else; but when the former is driven into a corner by the fact that the latter has somebody

else willing to give a larger sum, the former has to elect once for all whether he will or will not give the same sum as the other person is willing to give, and so exercise his option. If it were not so, the owner of the land, subject to the option, might always render it nugatory by negotiating with the owner of the option and saying, "If you will not give a million there is an end of your option," though he may never be able to get an offer of more than 100,000*l.* The mere negotiation without the pressure of an offer by another person bringing the matter to a head does not, according to my judgment, give the canal company a refusal of the land within clause 3.

I have so far dealt with the "refusal"; I now come to the question, what is meant by the word "offer"? In my opinion, the offer must be such as the canal company has power to accept. The Trafford Park Company were offering a sum of money, an option, and a covenant, which option and covenant the canal company could not have given or performed. To make such an offer to the canal company would have been futile. It would have been idle to expect the canal company (a statutory company with limited powers) to accept or refuse an offer obliging them to give a straight mile for a racecourse. The racecourse company propose to get over that difficulty by saying that though they never told the canal company what terms were offered by the Trafford Park Company, those terms, having regard to the option, were in fact equivalent to over 350,000*l.* cash, and it was therefore sufficient to offer the property to them at 350,000*l.* without more. I have already expressed my opinion that that was not an offer at all, because the canal company were never told that anyone else was offering that sum, and they could not have been truly so told, because the Trafford Park Company were not offering that sum in cash, and to say that the racecourse company could put their own value upon the option is idle. I hold as a fact that the option was nothing like the value alleged; therefore, so far as that is concerned, there has been no offer. The true meaning of the offer of the hereditaments en bloc is this: there must be an offer to sell at a cash price. That is the only thing that the canal company can accept; and the offer is meant to be one which they can accept, and

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not one which it would be beyond their powers to accept. Further, I think it must be an offer in fee, and not anything less than that, and en bloc means that it must be the whole of the property. No offer of this sort has been made.

Then comes the question of the relief asked. The particular agreement of December 22, 1899, cannot be treated as that of which an offer can be made to the canal company; but I could not declare it void, because supposing a bonâ fide cash offer is made by the Trafford Park Company or some other person, and the canal company are not willing to give that sum, I am not prepared to say that the racecourse company are not then at liberty to treat this agreement as a binding agreement, although they cannot now establish it against the canal company.

It is contended that whatever happens as regards the racecourse company, I cannot enforce clause 3 against the Trafford Park Company, who are only alienees of the land. There are two answers to that contention. The first answer is to be found in *Gomm's Case*. (1) I think that clause 3 creates an interest in the land. It is not artistically framed; but I think it was intended to create an interest in the land, so that the canal company should have the right to have this land if either of the events happened. That being so, the injunction would be to prevent any dealing with the land in a way contravening that interest. But even if it does not create an interest in the land, I see no reason for saying that while the matter rests in fieri, and before the legal estate has been conveyed, there is no jurisdiction to prevent the racecourse company from conveying and the Trafford Park Company from accepting a conveyance of the legal estate when that conveyance involves a breach of the racecourse company's prior contract with the canal company, of which contract the Trafford Park Company had notice. Assuming for a moment, as the Trafford Park Company contend, that if the conveyance had been carried out there would be a legal estate in the Trafford Park Company free from clause 3, what is there to prevent the Court from saying, before such conveyances to the racecourse and Trafford

(1) 20 Ch. D. 562.

Park companies, "You shall not carry out your bargain in contravention of the racecourse company's prior contract"? If, as in *Willmott* v. *Barber* (1), the Court refuses to grant specific performance of an agreement involving a breach of a prior contract with a third person, why should it not by parity of reasoning say to a purchaser, "You shall not aid or abet a breach of your vendor's prior contract with a third person so as to deprive that person of the estate for which he contracted"? I do not see any reason against interfering before conveyance to prevent such a breach of contract as that. The Trafford Park Company cannot complain, because they entered into the agreement with their eyes open. They knew of the existence of clause 3, and if they find that the canal company intervene and prevent the completion of their contract before they can get the legal estate, they have only themselves to thank for entering into a contract the completion of which would compel the racecourse company to commit a breach of a prior contract.

On these grounds I propose to declare that the contract of December 22, 1899, is not such a contract as is contemplated by clause 3, so that an offer of that contract cannot be made. In other words, the racecourse company could not and cannot now come to the canal company and say, "Look at this contract. Will you give us these same terms, or will you give us an equivalent money consideration?" There will be an injunction restraining the racecourse company from selling the racecourse to any person or company without having first offered it to the canal company at the same cash price that the intending purchaser is offering; and an injunction restraining the defendants from completing or carrying out the agreement of December 22, 1899, unless and until that has been done.

Solicitors: *Grundy, Kershaw, Samson & Co., London and Manchester; Lovell Widdrington Byrne, for Taylor, Kirkman & Colley, Manchester; Ashwell, Browning & Tutin, for Ashwell & Tutin, Nottingham.*

(1) 15 Ch. D. 96.

G. R. A.

FARWELL J.
1900
June 12, 13.

INGLE *v.* VAUGHAN JENKINS.

[1899 I. 2036.]

Merger—Agreement for Lease—Life Estate—Intention—Benefit.

The principle applicable to the merger of charges in equity applies also to the merger of leases. The Court is guided by the intention; and, in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested.

If a tenant for life in remainder takes a beneficial lease or an agreement therefor, and subsequently becomes tenant for life in possession, the presumption is against merger in equity.

WITNESS ACTION.

This was an action for specific performance of an agreement to grant a lease.

The first tenant for life under a strict settlement, having a power to grant a ninety-nine years' lease of any part of the settled estates to any person who built a house thereon, executed an informal instrument, which the Court held to amount to a valid agreement to grant a lease of three acres under the power, to the second tenant for life at a rent of 9*l.* per annum, on his erecting a proposed house, which he shortly after erected at a cost of 1500*l.*

The first tenant for life died after the house was erected, and the second tenant for life became legal tenant for life in possession of the settled estates.

The lease was never granted.

On the death of the second tenant for life the remainderman declined to recognise his executor's right to a lease under the agreement, on the ground (inter alia) that the benefit of the agreement or the equitable term thereby created had become merged or extinguished in the legal life estate of the termor.

The executor claimed specific performance against the remainderman.

Younger, Q.C., and *Cave*, for the plaintiff. Merger of an equitable interest in a legal estate only takes place where the

legal and equitable estates are coextensive and commensurate, which is not the case here.

Again, the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4, provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. Now, in equity, the Court is guided by the intention, and if that is unexpressed, it looks to the benefit of the person in whom the estates become vested: Lewin on Trusts, 10th ed. p. 889; *Snow* v. *Boycott*. (1) In the present case the improved rent would obviously have been largely in excess of the ground-rent; so the presumption is against merger.

Hughes, *Q.C.*, and *E. P. Hewitt*, for the defendant. An equitable term, the legal estate in which is vested in a trustee, does not merge in a legal life estate. But a mere agreement to grant a term is extinguished by the union of the characters of grantor and grantee.

The principle of regarding the intention is confined to the merger or extinguishment of charges. It has never been applied to the merger of a lease.

Gunter v. *Gunter* (2) implies that the lease bought up by the owner of the fee would have merged unless it had been assigned to a trustee for the purchaser, his executors, administrators and assigns.

[FARWELL J. referred to *Belaney* v. *Belaney*. (3)]

In that case the freehold reversion was conveyed to a trustee for the termor to prevent merger.

[FARWELL J. referred to *Grice* v. *Shaw* (4) and *Sing* v. *Leslie*. (5)]

Those cases related to the merger of charges.

Younger, *Q.C.*, in reply, referred to *Brandon* v. *Brandon*. (6)

FARWELL J. In this case I hold that the equitable leasehold interest was not merged or extinguished in the legal estate of the second tenant for life. In the first place, there was merely

(1) [1892] 3 Ch. 110.
(2) (1857) 23 Beav. 571.
(3) (1867) L. R. 2 Ch. 138.
(4) (1852) 10 Hare, 73.
(5) (1864) 2 H. & M. 68.
(6) (1861) 31 L. J. (Ch.) 47.

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an agreement to grant a lease, and I know of no case in which such an agreement, which is specifically enforceable in equity, has been held to be merged or extinguished because the person entitled to the lease subsequently happened to fill the position of lessor. For example, if a testator having agreed to grant a lease to J. S. devises the property to J. S. on certain trusts, J. S. is entitled to enforce the agreement against himself as trustee. In that case there is no merger. Similarly, if the testator devises the property to J. S. for life with remainders over, J. S. can still enforce the agreement against the estate, although if he is the person in whom the power of leasing is vested he would have to grant the lease to himself. In that case, also, there is no reason why the agreement should be merged or extinguished. Whatever might have been the case at common law, as to which it is unnecessary that I should express an opinion, it is, in my opinion, clear that it was not merged or extinguished in equity. I think the proposition in Lewin on Trusts, 10th ed. p. 889, is correct—namely, that "The principle by which the Court is guided is the *intention*; and in the absence of express intention, either in the instrument or by parol, the Court looks to *the benefit of the person in whom the two estates become vested.*" The author goes on to point out that the chief importance of the doctrine of merger is with reference to charges, and the cases he cites are confined to charges.

The defendant contended that a different principle applied in the case of a lease, but I am unable to follow that distinction. The principle being that the Court looks to the benefit of the person in whom the interests coalesce, I cannot see why there should be any distinction in this respect between a beneficial lease and a term to secure a charge. In either case the term is taken as an equivalent for money expended. Nor do I think it makes any difference whether the coalescence of the interests is brought about by operation of law or the acts of the parties. The principle of *Grice* v. *Shaw* (1) is applicable to the present case. The head-note is as follows: "Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the

(1) 10 Hare, 76.

same estate, the general rule is, that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was his intention, notwithstanding the absence of any other indication of such intention." That was a much stronger case than the present, as there the owner of the charge was tenant in tail, and yet the charge was held to be kept alive because it was for his benefit. The principle applies a fortiori to the case of a tenant for life, as it is well settled that when a tenant for life pays off a charge, it is kept alive for his benefit unless there is clear evidence of intention to the contrary. In the present case the equitable termor, before coming into possession as legal tenant for life, expended 1500*l.* in building a house on the property in consideration of an agreement to grant him a ninety-nine years' lease. Knowing that he might become tenant for life in possession, he expended that amount without expressing any intention as to what should happen to his leasehold interest when he came into possession. It was, however, clearly for his benefit that the interest should not merge. I therefore hold that, even if the lease had been granted, there would have been no merger in equity, on the ground that it would have been against the interest of the lessee tenant for life.

In *Grice* v. *Shaw* (1) Turner V.-C. says (2): "The general rule indeed is clear, that, where a party has an estate in fee or in tail, and at the same time a charge upon the estate, the charge will merge. . . . But the law does not, of course, prevent the party entitled to both the estate and the charge from keeping alive the charge; and the rule, therefore, yields to the intention, whether it is expressed or to be presumed. In the present case, there is certainly no express intention to keep alive the charge. There is nothing before the Court which can indicate any intention on the subject, except the will of George Grice; and, so far from any intention to keep alive the charge being indicated by the will, I have doubted whether it does not indicate an intention to merge it." Then he goes on to give

(1) 10 Hare, 76. (2) 10 Hare, 79.

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reasons against merger: "The question then is, What is the intention to be presumed with reference to this charge? Now, it is clear, that, if the testator merged this charge of 200*l.*, the two other charges of sums of 200*l.* in favour of the granddaughters would take, to that extent, priority over the estate of George; and it follows, therefore, that it was the interest of George to keep alive the charge of 200*l.* to which he was entitled." The present case is a fortiori, as the lessee was only a tenant for life, and it was clearly his interest to keep the term alive. I therefore hold that there was no merger.

Solicitors: *Busk, Mellor & Norris; Preston, Stow & Preston, for Rooke & Macdonald, Bath.*

G. R. A.

SANDERS-CLARK *v.* GROSVENOR MANSIONS COMPANY, LIMITED AND G. D'ALLESSANDRI.

BUCKLEY J.

1900

May 29, 30.

[1899 S. 2568.]

Injunction—Nuisance—Adjoining Premises—Alterations—Reasonable Use.

In considering cases of nuisance between owners of adjoining houses the Court will have regard to the question whether the person alleged to have created the nuisance is making a reasonable use of his property.

Observations of Kekewich J. in *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685, 690, questioned.

MRS. SANDERS-CLARK, the plaintiff, was the lessee for a term of fourteen years from May, 1892, of a flat on the first-floor of Grosvenor Mansions. At the time of the commencement of her lease the adjoining flats in the mansions were occupied exclusively for residential or professional purposes, and in no case for purposes of trade. The defendant G. D'Allessandri in 1898 took a lease of the premises immediately underneath the plaintiff's flat, and carried on there the business of an Italian restaurant. In order to do this he, amongst other alterations, put up a large cooking-range instead of the small grate formerly in the kitchen, and substituted wire gauze for glass in a window. The flue was not so constructed as to be properly adapted for the large cooking-range. The plaintiff alleged that D'Allessandri conducted his business so as to cause an intolerable nuisance to her by noise, heat, and smell, and brought an action against the Grosvenor Mansions Company, Limited, and him for an injunction. The action had been discontinued against the company. Since the action was begun alterations had been made by which the nuisance by heat had been removed by increasing the thickness of the walls of the flue. The plaintiff had offered to discontinue the action if D'Allessandri would make some further improvements, which she suggested, to remove the smell and noise, and would pay the costs of the action; but he declined to do so.

Astbury, Q.C., and *Bryan Farrer*, for the plaintiff. What the defendant is doing is something which is in itself noxious,

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and interferes with the ordinary use and enjoyment of his neighbour's property, and which is therefore a nuisance: *Robinson* v. *Kilvert* (1); *Broder* v. *Saillard* (2); *Gaunt* v. *Fynney*. (3) This is so even if the defendant is using his premises reasonably: *Reinhardt* v. *Mentasti*. (4)

[BUCKLEY J. referred to *Christie* v. *Davey* (5) and Garrett on Nuisances, 2nd ed. p. 161.]

Ingpen, *Q.C.*, and *T. H. Attwater*, for the defendant D'Allessandri, were stopped on the question of noise. As to the heat, precautions have been taken to remove the annoyance thereby caused; and the defendant is not liable even if there was great heat. The remedy, if any, is against the landlord on his covenant for quiet enjoyment, the construction of the chimneys having been defective.

[BUCKLEY J. The defendant must not unreasonably use his premises so as to sensibly annoy his neighbour.]

It has been held that the jurisdiction does not depend upon the question whether the defendant is using his own premises reasonably or not: *Reinhardt* v. *Mentasti*. (6)

There is no cause of action against the defendant in respect of the smells. This is not the case of an adjoining house, and, even if the same principles apply, in order that the plaintiff may succeed she must shew that the defendant has turned his house, or a portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour: *Ball* v. *Ray* (7); *Rapier* v. *London Tramways Co.* (8)

Astbury, *Q.C.*, in reply.

BUCKLEY J. held that the plaintiff had not proved a nuisance from noise, and that the alteration of the defendant's premises by putting up the cooking-range had caused a nuisance by heat, but that that had been removed, and continued:—The defendant says that he has nothing to do with the question of heat, and is not liable for the nuisance thus caused. It

(1) (1889) 41 Ch. D. 88, 94.
(2) (1876) 2 Ch. D. 692.
(3) (1872) L. R. 8 Ch. 8.
(4) 42 Ch. D. 685.
(5) [1893] 1 Ch. 316.
(6) 42 Ch. D. 690.
(7) (1873) L. R. 8 Ch. 467, 468.
(8) [1893] 2 Ch. 588.

appears to me that that is not so. When the defendant entered upon the premises and altered the buildings he was exposing his neighbour to an amount of heat which the flue was not constructed to bear and which might have been dangerous. That was not a reasonable use of the building. The question is whether he is liable for that, and in my opinion he is. I am not saying that the alteration was not such as he might properly make for the purpose of carrying on a restaurant, but that by so doing he was exposing his neighbour to a burden which he ought not to be called upon to bear.

In *Ball* v. *Ray* (1) Lord Selborne L.C. said: "In making out a case of nuisance of this character there are always two things to be considered, the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection." *Reinhardt* v. *Mentasti* (2) was cited, in which Kekewich J. is reported to have said that, "Notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own (3) reasonably or otherwise." I prefer to guide myself by the judgment of Lord Selborne to the effect that the Court must consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance; but if he is not using it reasonably, if

(1) L. R. 8 Ch. 467, 469. (2) 42 Ch. D. 685, 690.

(3) *Sic.*

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he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief.

In *Ball* v. *Ray* (1) Mellish L.J. said: "I entirely agree with what has been said by the Lord Chancellor, that when in a street like Green Street the ground-floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with." In this case the alterations made by the defendant were not reasonable. He has used his premises for a purpose for which they were not constructed, and he is therefore liable in respect of the second ground of complaint. [On the question of smell, his Lordship held that the defendant had unnecessarily exposed the plaintiff to the smell from the restaurant, and that that was unreasonable and a substantial interference with the plaintiff's comfort. The defendant undertaking to carry out the suggested improvements, there would be no order except that he should pay the costs of the action.]

Solicitors: *Nicholson, Graham & Graham; J. Rawes Baron.*

(1) L. R. 8 Ch. 471.

H. C. R.

ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL.

C. A. 1900 June 19, 20.

[1898 A. 1942.]

Local Government—Powers of Local Authority—Land acquired for Specific Purpose—Application of Part not required to another Permanent Purpose—Local Government Board—Jurisdiction—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 176.

Sect. 175 of the Public Health Act, 1875, which empowers the Local Government Board to direct that any lands acquired by a local authority in pursuance of any powers contained in the Act, and not required for the purpose for which they were acquired, shall not be sold, does not enable the Board to direct that those lands shall be applied permanently to any purpose inconsistent with the original purpose.

A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, and they will be restrained from so doing at the suit of the Attorney-General and the landowner from whom the land not required was purchased.

Decision of Kekewich J., [1900] 1 Ch. 51, affirmed.

APPEAL against the decision of Kekewich J. (1).

The action was brought by the Attorney-General, at the relation of the Earl of Jersey, and by the Earl as co-plaintiff, for an injunction to restrain the defendants from erecting an isolation hospital, or hospital for the reception of patients suffering from infectious diseases, on a piece of land at Hanwell.

This piece of land formed part of a larger piece of land which had been purchased by the Brentford Union (the defendants' predecessors) in 1883 from the Earl under the compulsory powers conferred by the Public Health Act, 1875, for the purpose of disposing of the sewage of Hanwell.

The land was conveyed by the Earl to the Brentford Union absolutely in fee.

The provisional order of the Local Government Board, dated April 30, 1881 (afterwards confirmed by the Act 44 & 45

(1) [1900] 1 Ch. 51.

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Vict. c. lxiii.), which authorized the Brentford Union to acquire the land, stated that it was required "for the disposal of the sewage of the parish of Hanwell," and the notice, dated December 10, 1880, given by the Brentford Union, under s. 176 of the Public Health Act, 1875, of their then intended application to the Local Government Board for the provisional order, contained a similar statement of the purpose for which the land was required.

About two acres of the land thus acquired proved to be unsuitable, owing to the elevation, for the disposal of the sewage; and the defendants, who had then succeeded the Brentford Union as the local sanitary authority, being desirous of erecting an isolation hospital, as they were empowered to do under s. 131 of the Act, applied to the Local Government Board to direct the retention by the defendants of the two acres as a site for the hospital.

After a local inquiry the Board on April 3, 1897, made the following order:—

"Whereas the Urban District Council of Hanwell have, under the provisions of s. 175 of the Public Health Act, 1875, made application to the Local Government Board to direct that certain land, having an area of two acres or thereabouts, and situate in the district of the said council, which land forms part of the land acquired by the Local Board of the District of Hanwell for the purposes of sewage disposal, but which is not required for such purposes, shall be retained by the said council as a site for the erection of a hospital for infectious diseases, other than small-pox:

"Now therefore we the Local Government Board do hereby direct that the said land shall be retained by the said council as a site for the erection of a hospital for infectious diseases, other than small-pox."

The defendants being about to erect the proposed hospital on the two acres this action was brought.

The plaintiffs alleged that the defendants had no power to use the land for any permanent purpose other than that for which it had been acquired.

The defendants relied upon the order of the Local Govern-

ment Board as empowering them to erect the hospital on the land.

Kekewich J. held that the Local Government Board had no jurisdiction to make the order which they had made, and that the defendants had no power to use the land permanently for a purpose inconsistent with that for which it had been originally acquired. The injunction asked for was accordingly granted. The defendants appealed.

Warrington, Q.C., and *Stallard*, for the defendants. The basis of the judgment of Kekewich J. is that the local authority have only a qualified ownership of the land. It is submitted that this view is erroneous. The land was conveyed to them absolutely, and they are the absolute owners of it, subject to certain restrictions imposed by Parliament, one of which is imposed by s. 175 (1) of the Public Health Act, 1875, namely,

(1) By s. 175, "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district. . . . Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold. . . ."

By s. 176, "With respect to the purchase of lands by a local authority for the purposes of this Act, the following regulations shall be observed; that is to say—

"(1.) The Lands Clauses Consolidation Acts, 1845, 1860, and 1869, shall be incorporated with this Act, except the provisions relating to access to the special Act, and except s. 127 of the Lands Clauses Consolidation Act, 1845:

"(2.) The local authority, before putting in force any of the powers of the said Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement, shall

"Publish once at the least in each of three consecutive weeks in the month of November, in some local newspaper circulated in their district, an advertisement describing shortly the nature of the undertaking in respect of which the lands are proposed to be taken, naming a place where a plan of the proposed undertaking may be seen at all reasonable hours, and stating the quantity of lands that they require; and shall further

"Serve a notice in the month of December on every owner or reputed owner, lessee or reputed lessee and occupier of such lands, defining in each case the particular lands intended to be taken, and requiring an answer stating whether the person so served assents, dissents, or is neuter in respect of taking such lands:

"(3.) On compliance with the

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that the land, if not required for the purpose for which it was acquired, shall be sold, "unless the Local Government Board otherwise direct." Sect. 127 of the Lands Clauses Consolidation Act, 1845, does not apply to a local authority. Under that section land not required for the purpose of the undertaking must be sold. The obligation to sell under s. 175 of the Public Health Act is qualified by the power given to the Local Government Board to direct otherwise. This shews that the Legislature was aware that the undertaking of a local authority is of a complicated nature—that it comprises several different undertakings—so that land acquired by them for the purpose of one of their undertakings, and not required for that purpose, may be required for the purpose of another of their undertakings, and this is the reason why power is given to the Local Government Board to remove the obligation to sell land which is superfluous as regards one undertaking only. There is no decision that land purchased under s. 175 cannot, under any circumstances, be used for any other purposes than those for which it was acquired. *Attorney-General* v. *Southampton Corporation* (1) was a very special case. There a local Act had expressly dedicated certain land to a special purpose, and it was held that the local authority could not employ it for any other purpose. *Attorney-General* v. *Sunderland Corporation* (2) was a similar case, and it does not apply to the present case. In *Attorney-General* v. *Teddington Urban Council* (3) it

provisions of this section with respect to advertisements and notices, the local authority may, if they think fit, present a petition under their seal to the Local Government Board. The petition shall state the lands intended to be taken, and the purposes for which they are required, and the names of the owners lessees and occupiers of lands who have assented dissented or are neuter in respect of the taking such lands, or who have returned no answer to the notice; it shall pray that the local authority may, with reference to such lands, be allowed to put in force the powers of the said Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement, and such prayer shall be supported by such evidence as the Local Government Board requires."

Sect. 177: "Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same."

(1) (1859) 1 Giff. 363.

(2) (1876) 2 Ch. D. 634.

(3) [1898] 1 Ch. 66.

was admitted that the land might at some future time be required for the purpose for which it had been originally acquired by the local authority, and all that was decided was that it might be temporarily used for another purpose. The point now raised did not arise there. If the Local Government Board simply direct that the land shall not be sold, the local authority will then be able to use it for any lawful purpose, it having been conveyed to them absolutely.

Renshaw, Q.C., and *Howard Wright*, for the plaintiffs. The provisions of s. 176 of the Act are substituted for the notices which are required to be given under the Lands Clauses Consolidation Act before compulsory powers of purchase can be obtained. Sect. 176 requires the local authority to give notice in the most public way of the purpose for which they require to take land which they propose to purchase compulsorily. Compensation to the landowner must be based upon the purposes for which the land is to be taken; the compensation might be much larger if the land were taken for the purpose of erecting a hospital for infectious diseases than it would be if the land were taken for sewage works, and it would be strange if, after the Legislature have taken such care to protect the landowner by requiring the most public notice to be given of the purposes for which land is to be taken, it should be possible to evade this requirement by means of a direction of the Local Government Board that land originally acquired for one purpose should be applied to another entirely different purpose. The omission from the Act of s. 127 of the Lands Clauses Consolidation Act, 1845, which requires that superfluous lands shall be sold within a period of ten years after the time limited for the completion of the works, is the key to the provisions of s. 175 of the Public Health Act, 1875. No time is limited by that section for the sale of land not required for the original purpose, and a discretion is given to the Local Government Board to direct that the land shall not be sold. No power is given to the Board to direct that the land shall be applied to any other purpose, and the local authority have no power so to apply it permanently. Sect. 177 empowers them, with the consent of the Local Government Board, to let the land.

Warrington, Q.C., in reply.

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LORD ALVERSTONE M.R. I have felt considerable difficulty during the course of the argument, and I do not think this can be regarded as a perfectly clear case, but, after the best consideration I can give to it, I think the judgment of Kekewich J. is right and ought to be affirmed.

In the year 1881 the predecessors in title of the defendants, the then urban sanitary authority for Hanwell, exercised the compulsory powers conferred by the Public Health Act, 1875, and purchased from Lord Jersey, under the provisions of s. 176 of that Act, a considerable quantity of land for sewage purposes. It is important to observe that by that section provisions are made for the protection of persons whose land a local authority desire to purchase compulsorily by requiring the local authority to publish a full advertisement of the nature of the undertaking in respect of which the lands are proposed to be taken, and that a petition shall be presented to the Local Government Board which shall state the lands intended to be taken and the purposes for which they are required. And in the provisional order (afterwards confirmed by Act of Parliament) under which the defendants' predecessors obtained power to acquire the lands there is an express recital that the then sanitary authority required to purchase and take the lands for the disposal of the sewage of the parish of Hanwell. And I think it must be taken that, unless that which has happened subsequently by virtue of s. 175 has altered the rights of the parties, the defendants' predecessors, and therefore the defendants, acquired the land under statutory powers and were authorized to acquire the land for the purpose of using it for the disposal of sewage.

It turned out that two acres of the lands thus acquired were not fitted for sewage purposes, and thereupon in the year 1897 or thereabouts the idea occurred to the defendants that they might use these two acres, not for a merely temporary purpose, not for anything in connection with sewage, but for the purpose of permanently establishing thereon an isolation hospital for infectious diseases. It was frankly admitted by Mr. Warrington that they proposed and in fact took steps to borrow money for the erection of a permanent hospital on these two acres—not a mere temporary user while the land was not

required for sewage purposes. It is not necessary for me to mention the steps taken which resulted in the order of the Local Government Board of April 3, 1897. [His Lordship read the order, and continued:—]

In my opinion no special weight or authority can be given to the latter words of the order which direct that the land shall be retained by the council "as a site for the erection of a hospital for infectious diseases, other than small-pox." It could not be nor has it been suggested that by virtue of any implied or expressed authority the Local Government Board had any powers to enforce against any unwilling person or persons who might otherwise have objected to it the establishment on this land of a hospital for infectious diseases. But it is said (and this is a point about which I have felt considerable difficulty) that the order must be taken to have been made under s. 175, as on its face it purports to be made, and that therefore it is a direction that the defendants may retain the land as their own, and that so retaining it they are entitled to use it for any purpose for which they can lawfully use land which belongs to them. If one could see that that was the intention of the Act to be gathered from those sections which prescribe the way in which land shall be compulsorily acquired and subsequently used, there would appear at first sight to be much weight in that argument.

But in my opinion the language of s. 175 is not sufficient to enable the local authority to apply the land permanently to a purpose different from that for which it was originally acquired. The provisions of s. 176 and the scheme of the Act with regard to the acquisition of land are very important. The local authority have a limited power. Their powers are given to them by statute, or by orders of the Local Government Board made pursuant to the provisions of the Act. Their power to acquire land compulsorily is to acquire it for specific purposes, and in my opinion, so long as they hold land thus acquired without some fresh statutory authority, they can only hold it for those purposes. I think that the doctrine and principle of *Attorney-General* v. *Southampton Corporation* (1)

(1) 1 Giff. 363.

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apply. It was not seriously disputed by the appellants that with regard to land as to which statutory power has been given to them to apply it for sewage or other purposes, the whole of the negotiation and contract for compensation proceeded upon the basis that they would hold the land subject to that restriction. I do not base my judgment upon anything contained in the conveyance, for I think the rights of the parties really depend upon and are governed by the statute.

That being so, we must consider what is the position of things when (setting aside the special directions about a hospital) the Local Government Board have directed that the land shall not be sold. I can imagine many reasons why it might be desirable that the land should remain in the hands of the local authority, even though they can only use it permanently for purposes consistent with those for which they originally acquired it. It might be very undesirable to have a third and perhaps an adverse owner coming in and building houses and acquiring rights as against some particular mode of user of the land, and I can well conceive that, quite apart from the right of the local authority to use it for any purposes for which they are entitled to use land, there might be many cases in which the Local Government Board in their discretion might think it right that the land should not be sold. But at any rate it seems to me that it would be going too far to suggest that into a provision which merely deals with the question whether the land shall or shall not be sold, you can import a power for the local authority to use it for a purpose wholly inconsistent with that for which it was originally acquired.

I think there still remains affecting the rights of both parties the restriction which was imposed upon a body which has a limited authority to purchase land under the provisions of s. 176 for certain specified purposes, and it cannot be said that, when a direction has been given that they need not sell the land, they hold it absolutely unfettered and free, so that they can use it as they could any other land which they had acquired without compulsory powers, by agreement with some one who was willing to sell land to them. I am not, of course, dealing with the case of a temporary beneficial user of the land, either

by letting it or of a temporary user by the defendants themselves. I am dealing with the case before us in which the defendants intend permanently to apply these two acres of land to a purpose to which they were not originally intended to be applied, and to which they had no power to apply them apart from this direction of the Local Government Board. The result of holding that the defendants can so apply the land would be to give power to the Local Government Board to affect the rights of parties who have never been heard on the matter, and who, indeed, have had no statutory opportunity of being heard. In any event, I think it would require much stronger words than a simple direction that the land shall not be sold to enable the defendants to use this land for the purpose for which they desire to use it.

For these reasons I think the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. What weighs most with me is this (I do not suppose there has been anything not bonâ fide in the conduct of the defendants)—that if they are right there would be a great opening for manipulating these sections of the Act for unjustifiable purposes. A local authority might say, "We are going to obtain land for a sewage farm; we had better take more than we really want in order that we may erect a hospital." I do not for a moment suggest that anything of this kind was in the minds of the defendants; but, if it is lawful to do what they propose doing, why should not such a scheme be carried out? The local authority might say, "Objection may be taken to the erection of a hospital, but we should be free to erect it when we have got the land and have obtained liberty from the Board to retain it instead of selling it. We could then apply it to any purpose for which we are authorized by statute to apply land."

For the reasons which have been given by the Master of the Rolls, I think the appeal should be dismissed.

COLLINS L.J. I also am of the same opinion. I think that any other decision would defeat the scheme of the Public Health Act, 1875.

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It is clear that this land was acquired, in the first instance, for the purpose of a sewage farm. It is also clear law that, having been acquired for that purpose, it could not have been diverted by the local authority to any other purpose. The scheme of the Public Health Act in ss. 175 and 176 is that, when a local authority desire to purchase land under their compulsory powers they can only do so after full notice by advertisement apprising the persons interested of what is intended to be done, and in particular apprising the person from whom the land is to be taken of the purposes for which they are acquiring it. I think the scheme involves this—that there can be no compulsory purchase of land unless the person from whom the land is to be taken has full information of the purposes for which it is required. Obviously, that is an important (if not the most important) factor in determining the compensation to be paid to him on the purchase.

Now, these being the conditions which the Legislature have imposed on the acquisition of land compulsorily, it would be an extraordinary thing if, when land has been acquired with all these formalities, and circumstances have arisen under which it is no longer required for the original purpose, that then, notwithstanding the formalities which the Legislature have interposed for the protection of the vendor, the purpose may be wholly changed, and one much more injurious to him, and which might have led to his obtaining double the compensation which he did receive, may be adopted by the local authority without any further evidence, without any further notice to him and without any further inquiry.

Take this instance, which is by no means impossible. Suppose a local authority acquired land compulsorily under s. 175 for the purpose of a public recreation ground, and within a year afterwards a neighbouring landowner should offer them a free gift of other land equally or more convenient for the purpose of a recreation ground, and they should accept it, so that the land originally purchased would be no longer required for the purpose, and under the provisions of s. 175 they would be obliged to sell it, "unless the Local Government Board

otherwise direct." Can it be suggested that the Board, by relieving them from the obligation to sell the land, could empower them to turn into a sewage farm that land which was bought for the purpose of a recreation ground? So to hold would be to allow a subsidiary clause contained in a parenthesis in s. 175 to defeat the whole scheme of s. 176. In my opinion due effect can be given to the words in the parenthesis consistently with the main scheme, and we are not obliged to say that by that parenthesis the Legislature have empowered the Local Government Board to defeat the purpose of the Act. I think that, as the Master of the Rolls has already pointed out, the words, "unless the Local Government Board otherwise direct," are introduced simply to qualify the exigency of the previous words which compel a sale there and then. There might be cases in which the local authority might be satisfied that they did not require some land for the purpose for which it had been acquired, and nevertheless the Local Government Board might not be absolutely of the same opinion, and might think it desirable to interpose some delay before a sale. That is a perfectly conceivable instance in which they might fairly and properly exercise their power, and in which it would be reasonable that the Legislature should have provided some mitigation of the exigency of the obligation to sell.

In the present case it seems to me that the Local Government Board have, by introducing into their order the purpose for which this land is to be retained by the council, attempted to do that which is entirely outside their powers under the Act. There is, I think, nothing in the Act which enables them, not merely to suspend the obligation to sell, but also to designate the purpose for which that obligation shall be suspended. If the order were tried by the condition appended to it, namely, that it shall be used as a site for a hospital, it would, in my judgment, be ultra vires. Indeed, Mr. Warrington has not contended that the defendants have acquired any further right by the added condition. He has relied simply upon the defendants' general rights as a local authority in possession of land unfettered by any limitation. But I think they cannot possess themselves of land through this machinery for one

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purpose and apply it to another without going through the process indicated by s. 176. To hold otherwise would, I think, defeat the scheme of the Act.

I agree, therefore, that this appeal must be dismissed.

Solicitors: *P. J. Dennis; Freshfields.*

W. L. C.

Dictum of FARWELL, J., at p. 395, *applied.* SMITH *v.* RIVER DOUGLAS CATCHMENT BOARD. [1949] 2 All E.R. 179.

C.A. 1899 FARWELL J. *Nov.* 2, 3, 7. C.A. 1900 *June* 20, 21; *July* 5.

ROGERS *v.* HOSEGOOD.

[1898 R. 2163.]

Restrictive Covenant—Benefit—Covenant running with the Land—Covenant enforceable in Equity—"One Messuage"—"House"—"Private Residence"—"Residential Flats."

When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by proof of facts inconsistent with it.

The owners of building land and their mortgagees conveyed a plot of the land in fee to a purchaser, who entered into a covenant with the mortgagors (but not with the mortgagees) that no more than one messuage or dwelling-house should at any one time be erected or be standing on the plot, and that such messuage should be adapted for and used as and for a private residence only. The conveyance stated that the covenant was entered into with intent that it might so far as possible bind the premises thereby conveyed and every part thereof, into whosesoever hands the same might come, and might enure to the benefit of the mortgagees, their heirs and assigns, and others claiming under them to all or any of their lands adjoining or near to the premises.

The mortgagors afterwards conveyed another plot of land near to the first in fee to a purchaser who had no knowledge of the covenant entered into by the purchaser of the first plot:—

Held, that assigns of the second plot could enforce the restrictive covenant against an assign of the first plot.

Decision of Farwell J. affirmed.

Held also, that the erection on the first plot of a large block of buildings, which were to be occupied as residential flats, would be a breach of the covenant.

The covenant having been released by the mortgagors (so far as they

lawfully could) as regarded the number of houses to be erected, the purchaser's devisee covenanted with the mortgagors that every messuage to be erected on the land should be adapted for and used as and for a private residence only:—

Held, that the erection of the proposed building would be a breach of the covenant also.

An injunction was accordingly granted to restrain the assign of the first plot from erecting such a block of buildings upon it.

TRIAL OF ACTION.

The plaintiffs W. R. Rogers, W. H. Millais, and George Gray were the owners of some land and houses at Palace Gate, Kensington, and the defendant Benjamin Hosegood was the owner of some adjoining plots of land.

By this action the plaintiffs claimed to enforce the observance by the defendant of some restrictive covenants contained in the conveyances to his predecessor in title of some of his plots of land.

In 1869 George Plucknett, the plaintiff Rogers, Thomas Robinson, and W. M. Dunnage were carrying on in partnership, under the style of Cubitt & Co., the business of builders, and they were the owners in fee (subject to a mortgage thereof) of some land at Palace Gate, which they had laid out in plots suitable for the building of large private dwelling-houses.

On May 31, 1869, one of the plots, afterwards known as the Thorney House plot, was conveyed by the partners and their mortgagees to William, the then Duke of Bedford, in fee, who had purchased the same. By this deed the Duke, with intent that the covenants thereinafter on his behalf contained might so far as possible bind the premises thereby conveyed and every part thereof, into whosesoever hands the same might come, and might enure to the benefit of the said G. Plucknett, W. R. Rogers, T. Robinson, and W. M. Dunnage, their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises, for himself, his heirs and assigns, covenanted with the four partners, their heirs and assigns, that no more than one messuage or dwelling-house, with such suitable outhouses and stabling (if any) as it might be thought fit to erect in connection therewith, should at any one time be erected or be standing on the

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Thorney House plot, and that such messuage should be adapted for and used as and for a private residence only, and that no trade or business should at any time be carried on in or upon that plot. This covenant was entered into with the four partners only, and not with the mortgagees.

Subsequently the Duke purchased another plot adjoining the Thorney House plot, and the same was conveyed to him by the four partners and their mortgagees by a deed dated July 31, 1869. By this deed the Duke, with intent, &c. (in the same words as in the deed of May 31, 1869), covenanted with the four partners, their heirs and assigns, but not with the mortgagees, that the messuage and buildings to be erected upon this adjoining plot should be adapted for and used as and for a private residence, and necessary outbuildings and stables, only, and that no trade or business should at any time be carried on, in, or upon that plot.

In the year 1872 Sir John Millais purchased from the four partners one of their plots at Palace Gate, separated from the Duke of Bedford's two plots by an intervening plot about 60 feet in width, and by a deed dated March 25, 1873 (which did not recite the above-mentioned covenants), the plot so purchased was conveyed to Sir J. Millais, together with "all the rights, easements, or appurtenances belonging or reputed to belong thereto," and he thereby entered into covenants not to build more than two messuages or dwelling-houses thereon, and not to carry on publicly upon the premises any trade or business, or to put up any sign upon the same indicating that any trade or business was carried on there. At the date of this conveyance Sir J. Millais had no knowledge of the covenants contained in the deeds of May 31 and July 31, 1869, and the conveyance to him contained no assignment of the benefit of those covenants, except such (if any) as might be implied by the use of the general words above quoted. This deed contained a recital of a covenant by the partners contained in the conveyance of the Thorney House plot to the Duke, but it contained no reference to the restrictive covenant entered into by the Duke.

The partners conveyed a third plot of land (adjoining the plot

secondly conveyed to him) to the Duke. In this conveyance there was no restrictive covenant by the Duke.

In the year 1872 William, Duke of Bedford, died, and Francis Charles Hastings, Duke of Bedford, became entitled as devisee under his will to the two plots of land comprised in the deeds of May 31 and July 31, 1869, and to the third plot.

By a deed dated October 30, 1876, the four partners, so far as they lawfully could, released Francis Charles Hastings, Duke of Bedford, and his two plots from the covenant restricting the number of houses to be built thereon contained in the deed of May 31, 1869, and from the restriction (if any) to the like effect in the conveyance of July 31, 1869; but it was provided that the release was not to prejudice or affect any of the other covenants contained in either of those deeds. By a contemporaneous deed the Duke covenanted with the four partners and each of them that he would indemnify them in respect of the above-mentioned release, and further that every messuage to be erected on the two plots, or either of them or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only, and that no trade or business should at any time be carried on, in, or upon the same plots or either of them or any part thereof.

Subsequently to the execution of all the above-mentioned deeds the plaintiff Rogers took a conveyance and release from his three partners of two other plots of their building land at Palace Gate, near to the Bedford and Millais plots, and thus became the sole owner thereof in fee.

Sir J. Millais died on August 13, 1896, and the plaintiffs William Henry Millais and George Gray were the surviving trustees of his will and devisees of his real estate, including his plot at Palace Gate.

The defendant had purchased the three Bedford plots from persons claiming through the devisee of William, Duke of Bedford, and at the time when he purchased those plots he had notice of the restrictive covenants to which two of those plots were subject. The defendant proposed to erect upon the three plots one large building, which was to be occupied as residential flats.

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The plaintiffs brought this action claiming (on behalf of all the plaintiffs)—(1.) a declaration that the erection or use on the Bedford plots or either of them of a building adapted for or to be used as or for flats would be an infringement of the covenants contained in the deeds of May 31 and July 31, 1869, and the secondly above-mentioned deed of October 30, 1876; (2.) an injunction to restrain the defendant from erecting on the said plots or either of them any building which by reason of its consisting of flats or otherwise should not be adapted as and for a private residence only; from using any building erected thereon otherwise than as and for a private residence only; and from carrying on any trade or business in or upon the two plots or either of them; and (on behalf of the plaintiffs the Millais trustees) (3.) an injunction to restrain the defendant from erecting on either of the plots any building which by reason of its consisting of flats, or groups of flats or otherwise, should consist of more than one messuage or dwelling-house, with suitable outhouses and stabling.

At the trial the defendant disclaimed all intention of providing any dining, coffee, reading, billiard, or other rooms, or kitchens to be used in common by the occupants of the flats.

The effect of the evidence as to the nature of the proposed buildings was thus stated by Farwell J. The buildings were to contain from thirty to forty flats, eight on each floor. There was to be only one front entrance, divided into two portions for the purposes of support; this entrance was to open into a corridor leading into a lighting hall in the centre of the building. This hall would be open to the sky, but would be surrounded by a colonnade, so as to enable the occupants of flats on the further side to pass into the street dry shod. The entrance would not admit of carriages passing into the lighting hall. There was also to be a back entrance and a tradesmen's entrance. Each flat was to be self-contained, to have its own front door, opening either on to the central court or on to the corridor leading to it, or, in the case of the first and upper floors, on to corridors communicating by lifts and staircases with the lighting hall. It was not proposed that any flat should open directly into the street.

The action came on for hearing before Farwell J. on November 2, 1899.

Haldane, Q.C., and *Christopher James*, for the plaintiffs.
Hughes, Q.C., and *A. J. Allen*, for the defendant.

1899. Nov. 7. FARWELL J. (after stating the facts) continued:—In this state of facts three questions arise for determination: (1.) whether the building proposed to be erected by the defendant is a breach of the covenant in the indenture of May 31, 1869; (2.) of that in the indenture of July 31, 1869; and, if so, (3.) whether the plaintiffs or any of them are entitled to sue in respect of those covenants. In considering the first two questions I have to determine three points: (1.) Is the building proposed to be erected one messuage or dwelling-house, or several? (2.) If it is one only, is it adapted for and used as and for a private residence only? (3.) Will a trade or business be carried on upon the premises by the mode in which the defendant proposes to use the same? In my opinion, a flat such as is proposed is not one messuage or dwelling-house, but several. I cannot see any substantial difference for the purposes of a covenant of this nature between a terrace of adjoining residences, separated from one another vertically, and a pile of residences, separated from one another horizontally. If the building of the defendant was carried no higher than the ground-floor it would, in my opinion, be impossible to contend that each of the residences opening on to the inner area was not a separate house, and I cannot see that the superposition of seven other rows of residences can make any difference. This is a mere question of construction of the particular document, on which a rating case such as *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) can have little bearing; but I should observe that in that case the Court held that the whole block was a house, but pointed out that each set of chambers might be a house also. The case of the domus mansionalis—*Evans and Fynch's Case* (2), cited by Jessel M.R. (3)—has some bearing on the point. The covenant

(1) (1876) 1 Ex. D. 469. (2) (1637) Cro. Car. 473.
(3) 1 Ex. D. 477.

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in the deed of July, 1869, differs from that in the earlier deed in that it contains no express covenant that there shall be one messuage only; but on the true construction of the covenant I have come to the conclusion that the result is the same. In my opinion, a large building which is to be used as thirty or forty separate residential flats does not answer the description of a messuage to be used as and for a private residence. But if the whole structure could be regarded as a private residence only, it is difficult to see how thirty or forty different families and establishments can find place therein, unless the owner of the entire messuage is carrying on the trade of letting apartments.

The third question is that which was most elaborately argued, namely, whether the benefit of the covenants in the two indentures of 1869 passed to Sir John Millais, and through him to his trustees, so as to enable them to maintain this action. It is not contended that the burden of those covenants has not passed to the defendant; he is obviously bound, by reason of notice, whether the covenant as regards him runs with the land or not: *Tulk* v. *Moxhay*. (1) It has been argued that this is a covenant the benefit of which runs with the land at law, or if not at law at any rate in equity; and further, that even if this is not so, the benefit of the covenants passes by the express general words, "rights, easements, or appurtenances belonging or reputed to belong thereto." In my opinion, the benefit of the covenants runs at law with the land now vested in the Millais trustees. I do not think it necessary to call in aid the analogy of easements, as suggested by Mr. Haldane, on the authority of *London and South Western Ry. Co.* v. *Gomm*. (2) The accurate expression appears to me to be that the covenants are annexed to the land, and pass with it in much the same way as title deeds, which have been quaintly called the sinews of the land: Co. Litt. 6 a. Thus the right to sue on such covenants passes to the heir and not to the executors; the assignee of such covenants could sue at law in his own name in the days when the assignee of no other chose in action could do so; and before the practice as to venue

(1) (1848) 2 Ph. 774. (2) (1882) 20 Ch. D. 562.

was abolished, actions on such covenants, when brought by lessees, were local and not transitory: see *Thursby* v. *Plant*. (1) The law in fact acted on the sound principle of giving damages to the party aggrieved. Covenants which run with the land must have the following characteristics: (1.) They must be made with a covenantee who has an interest in the land to which they refer. (2.) They must concern or touch the land. It is not contended that the covenants in question in this case have not the first characteristic, but it is said that they fail in the second. I am of opinion that they possess both. Adopting the definition of Bayley J. in *Congleton Corporation* v. *Pattison* (2), the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land. It is to my mind obvious that the value of Sir J. Millais's land is directly increased by the covenants in question. If authority is needed, I would refer to *Mann* v. *Stephens* (3), a case very similar to the present; *Vyvyan* v. *Arthur* (4); *The Prior's Case* (5); *Fleetwood* v. *Hull* (6); *White* v. *Southend Hotel Co.* (7) I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the land of the covenantor. This must always be the case with regard to grants in fee if it be the better opinion (as Cotton L.J. in *Austerberry* v. *Oldham Corporation* (8) and the editors of Smith's Leading Cases think) that the burden of such covenants never runs with the land. At common law the lessee's covenants ran with the land, but the lessor's did not run with the reversion; the statute 32 Hen. 8, c. 34, was passed to give the reversioner the same benefit that the lessee had; and the definition of a covenant which runs with the land, stated by the learned editors of Smith's Leading Cases, p. 58, is "when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion." But

(1) (1668) 1 Saund. 299, n. 10.
(2) (1808) 10 East, 130, 135.
(3) (1846) 15 Sim. 377.
(4) (1823) 1 B. & C. 410; 25 R. R. 437.
(5) (1368) 1 Sm. L. C. 10th ed. p. 56.
(6) (1889) 23 Q. B. D. 35.
(7) [1897] 1 Ch. 767.
(8) (1885) 29 Ch. D. 750, 775.

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a covenant may have the two characteristics above mentioned and yet not run with the land; it is in each case a question of intention to be determined by the Court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances. No covenant can run with the land which has not the two characteristics above mentioned, but every covenant which has those two characteristics does not necessarily run with the land. That it is a question of intention in each case, to be determined on construction, is apparent from the judgment of Hall V.-C. in *Renals* v. *Cowlishaw* (1), a judgment of the highest authority, not only from the weight attaching to the opinion of the learned Vice-Chancellor, but also from the approval that it has received in the Court of Appeal and the House of Lords: see *Spicer* v. *Martin* (2) and *Nottingham Patent Brick and Tile Co.* v. *Butler*. (3) The Courts have drawn the inference that the parties intended, or in other words the Courts have held on the true construction of the documents that they have contracted, that the covenants shall or shall not run with the land from various circumstances. Thus, in *Renals* v. *Cowlishaw* (1) there was nothing to shew what assigns were intended by the words of the covenant; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant; the inference, indeed, was to the contrary, and the Courts accordingly held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of the ordinary covenants for title: these undoubtedly run with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the first case the word "assign," on the true construction of the deed, means "assign of the covenant," in the latter "assign of the land, to which is annexed the benefit of the covenant by virtue of the evidence of intention

(1) (1878) 9 Ch. D. 125. (2) (1888) 14 App. Cas. 12.
(3) (1885) 15 Q. B. D. 261, 269.

so to contract which is found in the deed and the surrounding circumstances." Again, take the cases of building schemes. There is no express assignment of the benefit of the covenants, but it is held that the true intent of the parties, and consequently the true construction of the covenant, is to be found by applying the words of the deed to the surrounding circumstances. A similar conclusion has been arrived at in cases where there is no general scheme, but various persons enter into similar covenants with reference to lands that lie adjacent to one another. It is sufficient for me to refer to *Nottingham Patent Brick and Tile Co.* v. *Butler* (1); *Western* v. *MacDermott* (2); *Whatman* v. *Gibson* (3); *Coles* v. *Sims.* (4) Treating it then as a question of construction, I find the express contract to be that these covenants were entered into with intent that they should bind the premises conveyed by the deeds of 1869 and every part thereof into whosesoever hands the same might come, and should enure to the benefit of Messrs. Cubitt & Co., their heirs and assigns, and others claiming under them all or any of their lands adjoining or near to the said premises. The draftsman would appear to have had the words of Hall V.-C. before him when he framed this covenant, and I think it would be difficult to express the intention in clearer words. Inasmuch as the covenantees at the date of the covenant owned the land now belonging to the Millais trustees, and such land is in fact "near to" the defendant's land, I see no uncertainty as to the land to be benefited. I should add that, in my opinion, there can be no difference between law and equity in construing such covenants with a view to seeing whether they do or do not run with the land. The same words in the same document must necessarily bear the same meaning in all the Courts. It is true that in many of the cases decided by the Court of Chancery expressions are found to the effect that the defendants are bound in equity, whether the covenants in strictness run with the land at law or not. But I think that such expressions are due to the reluctance that the Vice-Chancellors felt to express

(1) 15 Q. B. D. 261; affirmed (1886) 16 Q. B. D. 778.
(2) (1866) L. R. 1 Eq. 499; 2 Ch. 72.
(3) (1838) 9 Sim. 196.
(4) (1853) Kay, 56.

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any opinion on points of common law, and, for the reason that I have already stated, I cannot see how such a covenant could run in equity if it did not run at law. One other point was made by Mr. Hughes—namely, that Sir J. Millais knew nothing of the existence of these covenants at the time that he bought, and I assume this to be the fact, as no evidence to the contrary was tendered; but in my opinion it is immaterial: such knowledge has never been held a necessary condition to success in an action on a covenant which runs with the land at law. The plaintiff's right in such an action does not depend upon what he believes himself to have bought, but upon what he has in fact bought, and he has bought the land with the covenants annexed. The defendant is not injured, for he bought the land with knowledge of the covenant, and he can claim no more than the land with that burden upon it. If authority is needed for this, *Child* v. *Douglas* (1) is expressly in point, and is not affected in this respect by anything said on the appeal, or at the trial, or by any subsequent authority. It is not necessary for me to determine whether the benefit of the covenants would pass under the general words to which I have referred above, if such covenants did not run with the land. If they are not in fact annexed to the land, it may well be that the right to sue thereon cannot be said to belong, or be reputed to belong, thereto; but I express no final opinion on this point. In the view that I take of the rights of the Millais trustees, I must make a declaration and grant an injunction as asked, but it is at their suit alone that I do so. The plaintiff Rogers joined in a deed of October 30, 1876, whereby Cubitts released the devisee of the late Duke of Bedford from the covenant as to the erection of one dwelling-house only. I have already held that the defendants threaten and intend to erect a number of dwelling-houses, and this, as against Rogers, they are entitled to do. I cannot hold that these flats constitute a business, although if I had thought that they constituted one dwelling-house only, I might have come to a different conclusion. I think that the proper course is to dismiss the action so far as it sets up any claim by Rogers; it would not be right that the

(1) (1854) Kay, 560.

judgment should appear to be made at his suit, or that he should be in a position to enforce an injunction which is obtained on the strength of another's title. The defendant must, therefore, be restrained from building as he proposed to do, and he must also pay half the general costs of the action.

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The defendant appealed, and the plaintiff Rogers gave a cross-notice of appeal. The appeal came on for hearing on June 20, 1900.

C. A.

Warmington, Q.C., Hughes, Q.C., and *A. J. Allen*, for the defendant. (1.) The erection of the proposed building will not be a breach of the restrictive covenant. It will be only one "house," and each of the separate flats will be "adapted and used as and for a private residence only": *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1); *Kimber* v. *Admans.* (2)

(2.) It cannot be denied that the defendant is subject to the burden of the covenant, because he acquired his land with notice of it. But it is submitted that the benefit of the covenant did not run with the land purchased by Sir John Millais, and that his trustees cannot maintain the action. In order that the benefit of a covenant may run with the land, it must be a covenant which "touches and concerns" the land of the covenantor, or, as it has been called, an "inherent" covenant: *Congleton Corporation* v. *Pattison* (3); *Thomas* v. *Hayward* (4); *Austerberry* v. *Oldham Corporation* (5); Sheppard's Touchstone, p. 176. "Touching or concerning" the land means *physically* touching or concerning it; not merely that the covenant is for the benefit of the land. In the present case the covenant relates to that which is to be done or not to be done upon the land of *the covenantor*, not of *the covenantee*. In order that a covenant may run with land at law it must be annexed to or be an incident of the land.

In the present case the Duke's covenant was entered into

(1) 1 Ex. D. 469.
(2) [1900] 1 Ch. 412.
(3) 10 East, 130.
(4) (1869) L. R. 4 Ex. 311.
(5) 29 Ch. D. 750.

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with the mortgagors, not with the mortgagees who had the legal estate. The benefit of the covenant could not, therefore, run with the land at law: *Webb* v. *Russell.* (1) Nor, it is submitted, did Sir John Millais obtain the benefit of the Duke's covenant in equity. There is no evidence of any general building scheme in relation to the land of the partners. Indeed, the restrictive covenants differed in the conveyances by them of different plots. One plot was conveyed to the Duke without any restrictive covenant by him.

No doubt the partners could have assigned the benefit of the Duke's covenant to Sir John Millais, but there was no express assignment to him. Nor can any intention to assign be implied. In the conveyance to Sir John there is a recital of the conveyance of March 31, 1869, to the Duke, and one of the covenants in it is recited, but there is no reference to the restrictive covenant in question. This omission negatives any implication of an intention on the part of the partners to assign the benefit of the restrictive covenant to Sir John. The deed is inconsistent with the existence of such an intention, and Sir John was not aware of the existence of the covenant, and could not have intended to acquire the benefit of it.

The general words, "together with all the rights, easements, or appurtenances belonging or reputed to belong thereto," are not sufficient to pass the benefit of the covenant. The omission of those general words would make no difference. But the benefit of this covenant is a contractual right. In order that there may be a building scheme there must either be a statement shewing what estate is intended to have the benefit of the restrictive covenants, or you must be able to infer from the transaction what that estate is, so that the covenantor would know to whom he must apply for the release of his covenant. The words "any of their lands adjoining or near to the said premises" in this covenant are too vague. As to what constitutes a building scheme, see *Keates* v. *Lyon* (2); *Mann* v. *Stephens* (3); *Child* v. *Douglas* (4); *Master* v. *Hansard* (5);

(1) (1789) 3 T. R. 393; 1 R. R. 725.
(2) (1869) L. R. 4 Ch. 218.
(3) 15 Sim. 377.
(4) Kay, 560.
(5) (1876) 4 Ch. D. 718.

Renals v. *Cowlishaw* (1), which was approved by the House of Lords in *Spicer* v. *Martin* (2); *Nottingham Patent Brick and Tile Co.* v. *Butler*. (3) There being no building scheme, it must be shewn that Sir John Millais purchased the benefit of the covenant. This has not been done.

Haldane, Q.C., and *Christopher James*, for the plaintiffs. It is not necessary in equity to shew any express assignment of the benefit of the covenant. At law the benefit of a covenant could not be assigned, and the question would be simply whether the covenant ran with the land; no assignment of the benefit was needed. The assignment of the land would pass the benefit of covenants annexed to the land. The authorities shew that in this respect equity follows the law. In equity you could no doubt assign the benefit of the covenant, but it passed with the equitable ownership of the land just as a covenant with a legal owner passed at law with the legal ownership of the land.

A court of equity inquired whether the benefit was of such a nature that it would run with the land at law, and if so it ran in equity. The benefit of this restrictive covenant would have run with the land at law: *Vyvyan* v. *Arthur*. (4) In that case the covenant "touched" other land than that which was demised; it was not annexed to the reversion of the demised premises. In *Vernon* v. *Smith* (5) it was held that a covenant to insure demised premises against fire ran with the land. Any covenant which would increase the value of the covenantee's land would run with the land at law: *Congleton Corporation* v. *Pattison* (6); *Horsey Estate, Limited* v. *Steiger* (7); *Austerberry* v. *Oldham Corporation*. (8) And such a covenant would run with the land in equity.

[RIGBY L.J. I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it.]

(1) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(2) 14 App. Cas. 12.
(3) 15 Q. B. D. 261; 16 Q. B. D. 778.
(4) 1 B. & C. 410; 25 R. R. 437.
(5) (1821) 5 B. & Al. 1; 24 R. R. 257.
(6) 10 East, 130.
(7) [1899] 2 Q. B. 79, 89.
(8) 29 Ch. D. 750, 777, 780, 784.

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That is no doubt so as to the burden of a covenant, but the rule is different as regards the benefit: *London and South Western Ry. Co.* v. *Gomm.* (1) The authorities in equity shew that when the intention is that a covenant shall benefit the covenantee as owner of his land, the benefit will go with the land. There may be an estoppel in favour of an assign: *Morton* v. *Woods.* (2) When possession of property is taken upon certain terms, the grantee and those claiming under him are estopped from disputing those terms. An assign of the reversion may establish his title against the lessee by way of estoppel: *Cuthbertson* v. *Irving.* (3) In equity the question is, who is in substance the owner of the land. This is implied in the cases relating to restrictive covenants. If once there can be shewn an intention to annex the covenant to the land, it must be taken in equity to pass with the land: *Child* v. *Douglas* (4); *Western* v. *MacDermott.* (5) The conveyances to the Duke express an intention that the benefit of the covenant should go with the land of the covenantees, and, moreover, there are the general words in the conveyance to Sir John Millais. The cases relating to apparent easements are analogous; general words have been held to pass such easements. In *London and South Western Ry. Co.* v. *Gomm* (1) Jessel M.R. treated a restrictive covenant as in equity analogous to a negative easement. The right to restrain the Duke from committing a breach of his covenant would pass under the word "rights" in the conveyance to Sir John Millais. The question is one of intention, and the intention is clear in the present case. The covenant was intended for the protection of the remaining property of the partners, and if Sir John Millais had purchased the whole of that remaining property he could clearly have enforced the covenant. It is expressed in the deed that the covenant is to enure for the benefit of all or any of the lands retained.

As to the cross-appeal, the erection of the proposed buildings would be a breach of the Duke's covenant in the second deed

(1) 20 Ch. D. 562, 583.
(2) (1868) L. R. 3 Q. B. 658; (1869) 4 Q. B. 293.
(3) (1860) 6 H. & N. 135.
(4) Kay, 560.
(5) L. R. 1 Eq. 499, 506; 2 Ch. 72.

of October 30, 1876, that every messuage erected on the two plots should be "adapted and used as and for a private residence only," and this entitles the plaintiff Rogers to maintain the action.

Hughes, Q.C., in answer to the cross-appeal and in reply on the appeal. The covenant limiting the number of houses to be erected has been released. Each flat should be treated as a separate house; and each flat is "adapted and used as and for a private residence only." The fact that there is not an exclusive access from the street to each flat does not prevent each flat from being a private residence. Each flat has its own separate front door.

The partners were not bound to assign to Sir John Millais the benefit of the Duke's covenant; they could have released it if they had chosen to do so. As regards intention, the question is what was the intention at the date of the assignment, not at the date of the covenant. There is no evidence of an intention to assign the benefit of the covenant to Sir John, and there are indications of a contrary intention.

Cur. adv. vult.

July 5. COLLINS L.J. read the judgment of the Court (Lord Alverstone M.R., and Rigby and Collins L.JJ.) as follows:—This case raises questions of some difficulty, but we are of opinion that the decision of Farwell J. is right and ought to be affirmed. It is not necessary to restate the facts, which are fully set out in his judgment. No difficulty arises in this case as to the burden of the covenants. The defendant is the assignee of the covenantor in respect of the two plots of land comprised in the conveyances of May 31 and July 31, 1869, and he took with notice of the covenants now sought to be enforced. Nor have we any hesitation in accepting the conclusion of Farwell J., that the buildings which the defendant proposes to erect will involve a breach of those covenants. The real and only difficulty arises on the question—whether the benefit of the covenants has passed to the assigns of Sir John Millais as owners of the plot purchased by him on March 25, 1873, there being no evidence that he knew of these

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covenants when he bought. Here, again, the difficulty is narrowed, because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they "touched and concerned" that land within the meaning of those words so as to run with the land at law we do not doubt. Therefore, but for a technical difficulty which was not raised before Farwell J., we should agree with him that the benefit of the covenants in question was annexed to and passed to Sir John Millais by the conveyance of the land which he bought in 1873. A difficulty, however, in giving effect to this view arises from the fact that the covenants in question in the deeds of May and July, 1869, were made with the mortgagors only, and therefore in contemplation of law were made with strangers to the land: *Webb* v. *Russell* (1), to which, therefore, the benefit did not become annexed. That a court of equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty. We think this is the plain result of the observations of Hall V.-C. in the well-known passage in *Renals* v. *Cowlishaw* (2), of Jessel M.R. in *London and South Western Ry. Co.* v *Gomm* (3), and of Wood V.-C. in *Child* v. *Douglas* (4), which, we agree with Farwell J., are untouched on this point by anything decided in the subsequent proceedings in that case. Referring to *Tulk* v. *Moxhay* (5), Jessel M.R., in *London and South Western Ry. Co.* v. *Gomm* (6), said: "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (7) to another line of cases, or else an extension in equity

(1) 3 T. R. 393; 1 R. R. 725.
(2) 9 Ch. D. 125.
(3) 20 Ch. D. 562.
(4) Kay, 560.
(5) 2 Ph. 774.
(6) 20 Ch. D. 583.
(7) (1582) 5 Rep. 16 a.

of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light .... Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land" (by which he clearly means the burden), "and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." In an earlier passage (1), dealing with the covenant in question in that case, namely, a covenant by a purchaser and his assigns to resell, if called upon by the vendor (a railway company), and with the objection that it contravened the rule against perpetuities, the learned judge said: "Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land." These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the

(1) 20 Ch. D. 580.

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covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant. The passage inclosed in a parenthesis in the report of the judgment of Hall V.-C. in *Renals* v. *Cowlishaw* (1) supports the same view, nor are the general observations or the decision of the case itself inconsistent with it. There, in the original conveyance which imposed the restrictive covenant, there was no expression, as there is in the present case, that the restriction was intended for the benefit of any part of the estate retained, and it is in reference to such a case that the Vice-Chancellor said: "The plaintiffs . . . . rest their case upon their being 'assigns' of the Mill Hill Estate, and they say that, as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill Estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length—namely, that in such a case a purchaser becomes entitled to" (the benefit of) "the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred shew that this is not the

(1) 9 Ch. D. 130.

law of this Court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase." So in *Child* v. *Douglas* (1) Wood V.-C. said: "Where part of the remaining property of the original vendor has been sold to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and, more especially, when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was in fact inserted in the other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land." These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion. When, as in *Renals* v.

(1) Kay, 571.

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Cowlishaw (1), there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We can find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. We are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed.

It is, however, still necessary to consider the question raised by the cross-notice of Mr. Rogers. Mr. Rogers is one of the persons with whom Francis, Duke of Bedford covenanted in the deed of October 30, 1876, "that every messuage to be erected on the two plots, or either of them, should at all times thereafter be adapted for and used as and for a private residence only." Mr. Rogers was a party to a deed of even date, whereby he and his partners released the Duke from the covenants restricting the number of houses to be built on the plots contained in the conveyances of May, 1869, and July, 1869. He afterwards took an assignment from his partners of two other plots of the firm's building land, near to the Bedford and Millais plots. Farwell J. dismissed the action, so far as it set up any claim by Rogers, on the ground that the latter

(1) 9 Ch. D. 125.

could not after the release above mentioned complain of the erection of several dwelling-houses; and the learned judge did not consider that the proposed building would be a violation of the covenant with Mr. Rogers, that every house to be erected on the two plots, or either of them, or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only. We are of opinion, however, that such a block of flats as it is proposed to erect would involve a breach of this covenant. Though we agree, as we have already said, that such a building does involve a breach of the covenant that no more than one messuage or dwelling-house should be erected or standing on the plot, and that such messuage should be adapted for and used as and for a private residence, we think it is also a breach of the covenant in question. Though the building proposed is certainly not one messuage or dwelling-house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling-houses "adapted for and used as private residences only," within the meaning of the covenant. We think that residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit. The cross-appeal, therefore, of Mr. Rogers must be allowed.

Solicitors: *Parker & Thomas; Stibbard, Gibson & Co.*

W. L. C.

KEKEWICH J.

1900

May 16; *June* 22.

In re DE NICOLS. DE NICOLS *v.* CURLIER.

[1897 D. 968.]

Conflict of Laws—Marriage—Domicil—Change of Domicil—Immovable Goods—French Law—Lex rei sitæ—Community of Goods—Statute of Frauds, ss. 4, 7.

A Frenchman and Frenchwoman married in France without any express marriage contract, so that according to the French law their rights as to property were subject to the law of community of goods. Subsequently they came to England and acquired an English domicil, and the husband amassed a large fortune, part of which he invested in real and leasehold property here. He died in the lifetime of the wife, having purported to dispose of all his property by an English will. It having been held that as to movables the wife was entitled notwithstanding the change of domicil to a one-half share under the law of community of goods, the question arose whether she was entitled on the same footing to a share of the real and leasehold property:—

Held, (1.) that there being here a special marriage contract defined by reference to the French Code, it had the same binding effect as an express contract, and was enforceable against the real and leasehold property in this country, subject to the question whether the Statute of Frauds required the contract to be in writing, as creating an interest in land; (2.) on the authority of *Forster* v. *Hale*, (1800) 5 Ves. 308; 4 R. R. 128, and *Dale* v. *Hamilton*, (1846) 5 Hare, 369, that the Statute of Frauds did not apply, inasmuch as this was in substance a contract for a partnership, and the property required for the purposes of the partnership was by operation of law held for those purposes:

Held, therefore, that the real and leasehold property was subject to the community of goods.

The testator and his wife, both of whom were French, were married in France in 1854. They entered into no "contrat de mariage," so that according to French law their rights as to property were governed by the rules of "communauté de biens." In 1863 they came over to England with property amounting in the whole to about 400*l*. They became permanently domiciled here, and in 1865 the testator became a naturalized British subject. The testator started business in London as a restaurant keeper, and he ultimately became the proprietor of the Café Royal, Regent Street, and amassed a

large fortune, part of which he invested in real and leasehold property in this country. He died in 1897, having by his will, made in English form, given his residuary estate to his executors and trustees upon trust for sale, and to hold the proceeds upon trust for his wife for life, and after her death upon trust for his only daughter and her husband and their children.

The widow took out an originating summons to ascertain her rights and interests in the property of the testator by reason of their having, while domiciled in France, married there without any contract. The question formulated in chambers for decision was, "Did the change of domicil alter the legal position of the parties to the marriage in reference to property?" It was arranged that the Court should first determine the effect of the change of domicil with reference to the testator's movable goods only. Upon that question Kekewich J. (1) held that the rights of the wife under the French marriage law as to communauté de biens were not affected by the change of domicil, and that she was entitled to a half-share of her husband's movables, and this decision, after being reversed by the Court of Appeal (2), was restored by the House of Lords. (3) The summons now came on for further hearing with reference to the testator's real and leasehold property.

The law relating to communauté de biens, as stated in an affidavit of M. Paul Lax, a Licentiate of Law in the University of France, will be found set out in the address of Lord Halsbury in the House of Lords upon the former hearing. (4) Some further evidence was adduced upon the present occasion as to the meaning of "immeubles" in the French Code. Speaking generally, the effect of the evidence was that the term was not confined to immovables in France, but applied equally to immovables in other countries.

Renshaw, Q.C., and *Ingle Joyce*, for the widow. The reasoning of the House of Lords on the former hearing applies to real and leasehold property as well as to personalty. The Statute of Frauds may be relied upon in opposition to the claim

(1) [1898] 1 Ch. 403.
(2) [1898] 2 Ch. 60.
(3) [1900] A. C. 21.
(4) Ibid. 24–26.

KEKEWICH J.
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of the widow on the ground that this is a contract conferring an interest in land, and as such must be evidenced in writing; but this is a contract by operation of French law, and the statute does not apply to a contract created by operation of law. It has been laid down by Lord Halsbury that this French marriage conferred an actual binding partnership proprietary relation fixed by law upon the persons of the spouses, and it is settled that a partnership contract may be proved by parol even though it deals with land. If the partnership is established, the land which is the subject-matter of the partnership is by operation of law held for the purposes of the partnership: *Forster* v. *Hale* (1); *Dale* v. *Hamilton* (2); Lindley on Partnership, 6th ed. pp. 89, 90. It is true that upon the appeal *Dale* v. *Hamilton* (2) took a somewhat different course, but Lord Cottenham L.C., in affirming the decision of Wigram V.-C. upon a different view of the facts, said nothing which in any way threw any doubt upon the reasoning of the Vice-Chancellor.

Further, the land now in question represents the investment of money acquired by the husband during the marriage, and must for the present purpose be treated as personal estate. The widow is entitled to follow that money, however it is invested. Everything that has been acquired by the husband during the marriage has been personalty, and it is a mere accident that at the time of distribution that personalty has been invested in real or leasehold property. The husband cannot put money into land so as to affect the rights of the wife. She takes by a paramount title founded on a contract implied by law.

We do not dispute that the devolution of land is governed by the lex situs, but we submit that the law of England contains nothing which prevents the land in question from being affected by this marriage contract.

Warrington, Q.C., and *Elgood*, for the executors and trustees.

P. O. Lawrence, Q.C., and *Whinney*, for the daughter and her children. This quasi contract will not be applied by the law of England to land in this country: Story on the Conflict

(1) (1798) 3 Ves. 696; 5 Ves. 308; 4 R. R. 128.
(2) 5 Hare, 369; (1847) 2 Ph. 266.

of Laws, 8th ed. p. 250, s. 158; Westlake on Private International Law, 3rd. ed. p. 192, s. 167; Foote's Private International Jurisprudence, 2nd ed. p. 212; Dicey's Conflict of Laws, p. 516, r. 138. The principle that all rights over land are governed by the law of the country where the land is situate applies to land however and wherever acquired. If this personal property can be followed into its investment in land, as is contended, that is really applying the French law to land in England, and is acting contrary to the principle above stated. Further, we rely upon ss. 4 and 7 of the Statute of Frauds. *Kelly* v. *Webster* (1) shews that the statute applies to every contract which effects a parting with an interest in land. We cannot in this Court dispute the validity of *Forster* v. *Hale* (2) and *Dale* v. *Hamilton* (3), which have been recognised by your Lordship in *Gray* v. *Smith* (4); but we say that those cases relate to a commercial partnership, and do not apply to this case. It is not right to say that this is a contract by operation of law in the sense that the Statute of Frauds does not apply to it. We protest against the attempt to import into this contract, which arises from the application of the French Code, the English law of partnership, whether as regards its effect upon the Statute of Frauds or as regards the following of assets.

Renshaw, Q.C., in reply.

Cur. adv. vult.

June 22. KEKEWICH J. Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicil, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is

(1) (1852) 12 C. B. 283.
(2) 3 Ves. 696; 5 Ves. 308; 4 R. R. 128.
(3) 5 Hare, 369; 2 Ph. 266.
(4) (1889) 43 Ch. D. 208.

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some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the Code and the evidence given in explanation of it. On the present occasion the Court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England—that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration—one of fact—namely, whether these estates are within the scope of the contract; the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the Court. This evidence was directed to the proper meaning of "immeubles" in the French Code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France some things are, from their close connection with the land, treated as attached to it, and, therefore, immovable; but these exceptions do not impair the general description, and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an English instrument which the Court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to

arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the Court. It is a matter of fact with which the Court can only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest, and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the Code as regards "immeubles," are of universal application—that is, apply equally to immovable property situate in France and to that situate in a foreign country.

Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story on the Conflict of Laws, s. 158, the learned author says this :—

"The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract, the lex loci contractus (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries, it will govern movables, but not immovables, the former having no situs, and the latter being governed by the lex rei sitæ."

In the following section—159—he expounds this subject in a manner so apposite to the case in hand that it is worth while to quote it at length. It runs thus :—

"Perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonises with the analogies of the common law, is, that in the case of a marriage where there is no special nuptial contract, and there has been

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no change of domicil, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may be situate; but real or immovable property ought to be left to be adjudged by the lex rei sitæ, as not within the reach of any extra-territorial law. Where there is any special nuptial contract between the parties, that will furnish a rule for the case, and, as a matter of contract, ought to be carried into effect everywhere, under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords, there is here a special nuptial contract between the parties ascertained by reference to the Code, but not less precisely ascertained because it was not reduced into writing in connection with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other classes of contracts, one of which is, that as regards immovables, the lex rei sitæ must prevail. There is nothing in the common law of England to make the contract, which we have already seen to be definite, unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the Statute of Frauds, but that does raise a formidable objection. Reference was made in argument to both the 4th and 7th sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail.

In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, *Forster* v. *Hale* (1) and *Dale* v. *Hamilton*. (2) In the latter case Wigram V.-C. applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership, 6th ed. p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick* v. *Skidmore*. (3) This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray* v. *Smith*. (4) Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the Court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt, that is also a contract of partnership; but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the Court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in *Forster* v. *Hale* (1) seems to me to shew that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Wigram V.-C. in *Dale* v. *Hamilton* (2), and also, as it seems to me, of Lord Lindley, who cites the passage from the Lord Chancellor's judgment in *Forster* v. *Hale* (1) which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then

(1) 3 Ves. 696; 5 Ves. 308; 4 R. R. 128.

(2) 5 Hare, 369.

(3) (1857) 2 De G. & J. 52.

(4) 43 Ch. D. 208.

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the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her on certain terms described briefly by the phrase, community of goods. Any lands subsequently acquired are an acquisition brought within, and are required to fulfil the purposes of the contract, and according to the Lord Chancellor's reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor's ruling, but I am unable to discover it, and must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.

Solicitors: *Hicks, Arnold & Mozley; Tyrrell Lewis, Lewis & Broadbent.*

H. B. H.

In re HADLEIGH CASTLE GOLD MINES, LIMITED.

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June 14, 15, 26.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51—*Shareholders' Meeting—Evidence—Declaration of Chairman.*

Apart from fraud, the declaration of the chairman of a meeting that a special resolution has been passed is conclusive.

At a meeting of a company duly convened to pass an extraordinary resolution to wind up voluntarily, the chairman declared the resolution carried on a shew of hands; a poll was not demanded by five members. On a petition by a holder of paid-up shares to wind the company up compulsorily, the Court refused to entertain the question whether the resolution was carried by the requisite majority.

Young v. *South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268, not followed.

THIS was a petition by two holders of fully paid-up shares for an order to wind up their company compulsorily, notwithstanding the existence of a minute to the effect that an extraordinary resolution had been passed to wind up voluntarily, or, in the alternative, to continue the winding-up if there was a valid winding-up under the supervision of the Court. On January 31, 1900, a meeting of the company, duly convened, was held for the purpose of considering and, if thought proper, passing an extraordinary resolution to wind up voluntarily and appointing a liquidator. At the meeting an amendment to the resolution was proposed and seconded by persons opposed to winding up voluntarily. The amendment, on being put, was lost by a shew of hands. The meeting was a stormy one, and there was considerable conflict of evidence as to what took place. His Lordship held, on the evidence, that the resolution had been duly put to the vote by a shew of hands, and the chairman declared it carried, and no proper demand for a poll, signed by five members, had been made.

The petitioners sought to impeach the validity of the extraordinary resolution on the ground that it had not been carried by a majority of three-fourths of the members present.

Younger, Q.C., and *Maugham*, for the petitioners. If there was in fact a declaration by the chairman of the meeting that

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the resolution was carried, that declaration is not conclusive; we submit that not only in case of fraud, but if there was haste, bias, or mistake on the part of the chairman—and there is evidence to establish that there was not a three-quarter majority, and the sense of the meeting was not deliberately taken. In *Young* v. *South African and Australian Exploration and Development Syndicate* (1) Kekewich J. held that the declaration of the chairman that a resolution had been passed was not conclusive of the fact. In *In re National Debenture and Assets Corporation* (2) Kekewich J. held that under s. 18 of the Companies Act, 1862, a certificate of incorporation was not conclusive; and on this point his ruling was not dissented from in the Court of Appeal. In *Ernest* v. *Loma Gold Mines, Limited* (3), the Court of Appeal did disregard the declaration of a chairman that a resolution had been passed so far as to go into the question whether votes had been properly accepted or rejected.

W. H. Cozens-Hardy, for the company. *Eve, Q.C.*, *Cave*, and *Edward Ford*, for shareholders and debenture-holders opposing the petition. *In re National Debenture and Assets Corporation* (2) has no application: it went to the question whether in a company the essentials of incorporation existed. The analogous question would be whether the chairman was duly appointed. A distinction between the two classes of questions is pointed out by Lindley L.J. in *Baroness Wenlock* v. *River Dee Co.* (4)

In *Peel's Case* (5) the Court of Appeal held that a certificate of registration was conclusive. In *In re Laxon & Co.* (6) Vaughan Williams J. took the same view. In *Wall* v. *London and Northern Assets Corporation* (7) North J. took a strictly literal view of the effect of a power given to a chairman to decide as to the validity of votes, holding that the decision of the chairman was final. On this section the declaration of the chairman has been held conclusive by Hall V.-C.: *In re*

(1) [1896] 2 Ch. 268.
(2) [1891] 2 Ch. 505.
(3) [1897] 1 Ch. 1.
(4) (1888) 38 Ch. D. 534, 545.
(5) (1867) L. R. 2 Ch. 674.
(6) [1892] 3 Ch. 555.
(7) [1899] 1 Ch. 550.

Brynmawr Coal and Iron Co. (1); and in *In re Gold Co.* (2) it was so laid down in course of argument by James L.J., assented to by the other judges of appeal, and the ruling was acquiesced in. These cases were not before Kekewich J. in *Young* v. *South African and Australian Exploration and Development Syndicate* (3), which we submit is against authority, convenience, and the plain language of the section.

Maugham, in reply.

June 26. COZENS-HARDY J. This is a petition by fully paid shareholders asking for a compulsory order. An extraordinary resolution to wind up voluntarily was proposed at a general meeting of the company duly convened on January 31 last. At this meeting the chairman declared the resolution to be carried on a shew of hands. I find this as a fact. No poll was demanded. The petitioners ask for a compulsory order (first) on the ground that the extraordinary resolution was not passed by the requisite majority, the chairman's declaration having been founded upon a mistake, and (secondly) on the ground that there are charges against the directors and promoters which it would be better to investigate by means of a compulsory order.

The first point raises a serious question under s. 51 of the Companies Act, 1862, whether after the declaration of the chairman it is competent for the Court to receive evidence to impeach that declaration. Treating the matter apart from authority, it seems to me that this question must be answered in the negative. Sect. 51 enacts that "unless a poll is demanded by at least five members a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the same." "Conclusive" seems to me to be a clear word. The Act contains several forms of language. By s. 67, a minute signed by the chairman "shall be received as evidence" in all legal proceedings. By Table A, art. 42, at any general meeting,

(1) W. N. (1877) 45. (2) (1879) 11 Ch. D. 701.
(3) [1896] 2 Ch. 268.

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unless a poll is demanded, a declaration by the chairman that a resolution has been carried and an entry to that effect in the book of the proceedings of the company "shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution." I cannot regard "conclusive" as equivalent to "sufficient." I think the Legislature intended, in the case of a special or extraordinary resolution, that the chairman's declaration should be conclusive unless challenged by means of a poll demanded by five members.

This view, however, is directly contrary to that expressed by Kekewich J. in *Young* v. *South African and Australian Exploration and Development Syndicate.* (1) He says, with reference to s. 51 (2): "The reasonable construction of that clause seems to me to be that you are not bound to prove either the number or proportion of the votes, but that, without more, the declaration of the chairman is to be accepted as conclusive evidence without that proof; not that it shall be accepted as conclusive if there is proof that the number or proportion of votes is against the declaration. If there is proof forthcoming that the declaration is inconsistent with the real facts, I do not think that the word 'conclusive' goes so far as to exclude that evidence; for otherwise it would open the door to gross mistake if not to fraud."

I have felt considerable doubt whether I am at liberty to follow my own view, but I think for the reasons which I am about to state I can do so. Kekewich J. was under the impression, as stated at page 274, that the point arose before him for the first time. His attention was not called to the *Gold Company Case*, which is reported in 11 Ch. D. 701, but is more fully reported in 48 L. J. (Ch.) 281. In that case only seventeen shareholders were present. Eleven voted for the extraordinary resolution to wind up voluntarily, two against it, and four did not vote at all. No poll was demanded, and the chairman declared the resolution to be carried. It seems plain that this was a mistake, for there was not the requisite three-fourths majority. Malins V.-C. treated the voluntary

(1) [1896] 2 Ch. 268. (2) [1896] 2 Ch. 275.

winding-up as valid, but nevertheless made a compulsory order. In the Court of Appeal this order was reversed. It appears from the *Law Journal* report, page 286, that counsel for the respondent (petitioner) were about to argue that the voluntary winding-up was irregular and that the wishes of the shareholders were not properly ascertained, upon which James L.J. remarked, "As no poll was demanded the ruling of the chairman is by s. 51 made conclusive. You cannot go into that now." This apparently was the decision of the whole Court. The Court discharged the order of Malins V.-C. and recognised that the voluntary winding-up could not be impeached. This decision was not brought to the notice of Kekewich J., and under the circumstances I think myself at liberty to disregard his decision and to follow my own view. The result is that I must treat the winding-up as valid and not capable of being impeached.

I may add that this result seems to me to be eminently convenient, for the present case furnishes a remarkable illustration of the extreme difficulty of ascertaining precisely what took place at a noisy meeting of shareholders; no two witnesses agree. It is perhaps right that I should observe that Vaughan Williams J. in *In re Bidwell Brothers* (1), and Chitty J. and the Court of Appeal in *Ernest* v. *Loma Gold Mines, Limited* (2), considered whether a chairman had proceeded upon correct principles; but the point was not taken that a chairman's declaration is made conclusive, and the attention of the Court was not called to the authorities. I cannot regard either of those cases as decisions adverse to the view which I have expressed. On the second point, I feel no difficulty in saying that the petitioners have not established any case. The decision of the Court of Appeal in the *Gold Company Case* (3) is itself a strong illustration of the doctrine that the Court will not, under ordinary circumstances, make a winding-up order after a voluntary winding-up at the instance of shareholders. Such rights as they may have against directors or promoters

(1) [1893] 1 Ch. 603. (2) [1896] 2 Ch. 572; [1897] 1 Ch. 1; (3) 11 Ch. D. 701.

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can be enforced by means of an application under s. 138. Moreover, I see no reason to doubt that the liquidator will do his duty. The result is that I must dismiss the petition, and dismiss it with costs.

Solicitors: *Gibbs, White & Strong, for John Moxon, Newport, Mon.; Rose-Innes, Son & Crick; Courtenay, Croome, Son & Finch.*

D. P.

KING *v.* SMITH.

[1899 K. 2578.]

FARWELL J.

1900

May 24, 25.

Mortgage—Receipt in the Body thereof—Mortgagor's Signature induced by Fraud of his Solicitor—"Non est factum"—Estoppel—Title of Mortgagee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 54, 56.

Two trustees advanced money on a mortgage of realty. S., one of the trustees, paid the money to E., a solicitor, who produced to him the mortgage deed executed by K. as the mortgagor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K., who was not a man of much education, and employed E. from time to time in relation to his property, and had implicit confidence in E., had signed the deed on his advice, but did not know that it was a mortgage and had not instructed E. to obtain a mortgage. E. misappropriated the money and absconded. On discovery of the fraud K. brought an action against the trustees to set aside the mortgage:—

Held, that under the circumstances K. was estopped by his conduct from denying (1.) that the mortgage was valid, and (2.) that E. had authority to receive the mortgage money.

The expression, "a solicitor" who produces a deed, in s. 56 of the Conveyancing Act, 1881, discussed.

Dictum of North J. in *Day* v. *Woolwich Equitable Building Society*, (1888) 40 Ch. D. 491, questioned.

THIS was an action to obtain a declaration that a certain mortgage executed by the plaintiff was void, and an order for its delivery up to be cancelled, under these circumstances.

The plaintiff, who was not a man of much education, was in the habit of buying small properties. For many years (since 1881) he had from time to time employed one Eldred, a member of the firm of Eldred & Bignold, solicitors, to act as his solicitors in completing his purchases. He did not understand deeds and did not read them. He also used Eldred as his banker, placing money with him at 10 per cent. interest and taking his promissory notes for the amount. When a purchase was completed he left Eldred to pay the money, returning him promissory notes cancelled to the amount; but if a balance of cash was required, he paid Eldred the cash. He had implicit

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confidence in Eldred, and signed whatever deeds Eldred advised him were necessary in connection with his property. On April 6, 1894, he signed a deed which Eldred advised him was necessary. This was the deed in question. It was expressed to be made between the plaintiff of the one part, and the defendants Smith and Fricker (who were trustees) of the other part, whereby the plaintiff purported to convey one of his properties to the defendants by way of mortgage as security for 300*l.* advanced by them to him. The deed contained in the body of it the usual receipt for the mortgage money, and Eldred was the attesting witness to the plaintiff's signature. The plaintiff did not know it was a mortgage, and had not instructed Eldred to obtain a mortgage. He never had occasion to mortgage. Meanwhile Eldred had, on February 19, 1894, written to the defendant Smith, with whom he was acquainted, as follows:—

"300*l.* Mortgage.

"We have a very good investment for this sum on freehold property at 5 per cent. interest, if you have the same at your disposal for investment. The property cost 475*l.* at auction, and a few years back clients of ours advanced 400*l.* on mortgage . . . . We have no hesitation in submitting it to you as a very safe investment for the amount required."

On February 20 Smith replied:—

"In reply to yours of yesterday I have a little trust money I want to get out at 5 per cent. which I think my co-trustee would be inclined to lend, so you had better send on the particulars of the 300*l.* mortgage."

Eldred accordingly sent on the particulars of the property, and stated that the plaintiff was the intending mortgagor. The defendants agreed to the mortgage, and on March 29 Eldred wrote the defendant Smith that the mortgage was ready, and asked for a cheque to complete the matter. Thereupon on April 6 the defendant Smith attended at the office of Eldred & Bignold, and, on production to him by Eldred of the deed executed by the plaintiff, he handed Eldred his cheque of 300*l.* drawn in favour of Eldred & Bignold, which Eldred cashed the same day. Eldred retained the deed (which was undated)

for stamping, and on April 17 he handed the deed (the date being filled in as April 11) duly stamped with the other title-deeds to the defendant Smith, who retained them. Eldred & Bignold were not retained by the defendants to act, and did not in fact act, as their solicitors in the matter. Eldred did not account to the plaintiff for the 300*l.*, but applied it to his own use. He paid interest on the mortgage to the defendants until July, 1899, when he absconded. The fraud was then discovered, and the plaintiff brought this action as above stated. This was the trial of the action.

Hugo Young, *Q.C.*, and *Johnston Edwards*, for the plaintiff. The signature of King to the mortgage was obtained by the fraud of Eldred. King is therefore entitled to say non est factum—that the deed is not his deed. The defendants will rely on s. 56 of the Conveyancing Act, 1881 (1); but a solicitor producing a deed, containing a receipt, must, in order to discharge a person paying him, be acting for the person sought to be charged: *Day* v. *Woolwich Equitable Building Society*. (2) Before the Act the production by a solicitor of a deed with receipt indorsed duly executed and signed was not by itself an authority to him to receive the purchase-money: *Viney* v. *Chaplin*. (3) Sect. 56 was passed to meet that difficulty, and merely confers on a solicitor producing an executed deed a statutory authority to receive the consideration; but, as pointed out by North J. in *Day* v. *Woolwich Equitable Building Society* (2), he must be a solicitor "acting in some way" for

(1) The Conveyancing and Law of Property Act, 1881, enacts:—

Sect. 54: "A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed."

Sect. 56: "Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

(2) 40 Ch. D. 491.

(3) (1858) 2 De G. & J. 468.

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the party sought to be charged. "Acting in some way" means acting as solicitor in the particular matter. Here Eldred was not at the time acting or employed in the matter of the mortgage for King, because he had no authority in fact to mortgage or to receive the mortgage money. Therefore the case is not within s. 56.

Hughes, Q.C., and *G. Henderson*, for the defendants. King cannot be heard to say that the deed is void. He trusted Eldred implicitly, and signed the deed on the advice and representation of Eldred, who was acting as his solicitor at the time. He knew, therefore, that he was doing something with his property, and must bear the loss occasioned by the fraud of his agent: *Hunter* v. *Walters* (1); *Lloyd's Bank, Limited* v. *Bullock*. (2) Further, the defendants are protected by ss. 54 and 56 of the Conveyancing Act, 1881. Sect. 54 merely gets rid of the necessity of an indorsed receipt; but s. 56 says, "Where a solicitor produces a deed, &c.," payment to the solicitor is a good discharge to the party liable to pay. If "a" solicitor produces the deed, that is sufficient. It is not necessary that he should be "the" solicitor employed in the particular transaction. The observations of North J. in *Day* v. *Woolwich Equitable Building Society* (3) are mere dicta, and go beyond the section. But if the section means a solicitor acting in some way for the party to be charged, then Eldred was acting as solicitor in the matter for King, because King signed the deed on the advice of Eldred as his solicitor, even although his signature was obtained by a misrepresentation.

Hugo Young, Q.C., in reply. "A" solicitor does not mean "any" solicitor. The section is dealing with the case of principal and agent. That is the foundation of the section, and a solicitor producing the deed must be the agent of the principal for the purposes of the section, and, therefore, he must be the solicitor acting for the principal in the particular matter. Here, Eldred was not acting as solicitor for King in the matter of the mortgage. He had no authority whatever for that purpose.

(1) (1871) L. R. 7 Ch. 75. (2) [1896] 2 Ch. 192.
(3) 40 Ch. D. 491.

FARWELL J. This is one of those unhappy cases where one of two honest men has to suffer for the default of a rogue. The question arises on a mortgage of 300*l.* executed by the plaintiff King. [His Lordship then stated the facts, and continued:—]

The first question is, Who is to suffer the loss? First of all, there is the plea of non est factum. Mr. King says, "I did not know that the deed was a mortgage; I never intended to execute a mortgage; and it is not my deed. It was procured from me by the fraud of Eldred." But the fact that Eldred undoubtedly swindled him does not establish the plea. I take in that connection the judgment of Mellish L.J. in *Hunter* v. *Walters* (1), where he says (2): "The only part of this case upon which I wish to make any observation is, the question whether the legal estate in the property passed by the deed executed by Mr. Hunter, and the legal estate in the small portion of it which was in Darnell, passed by the same deed as having been executed by Darnell. Now, I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law. But it is said that there is something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. Walters never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid." Then the learned judge goes on: "Now, in my opinion, it is still a doubtful question of law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it

(1) L. R. 7 Ch. 75. (2) L. R. 7 Ch. 86.

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negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it." He does not answer that question; and, so far as I am aware, that exact question has never been answered since; and I am glad to say it is not necessary for me to answer it now. The learned judge goes on, and makes this statement of the law (1): "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." Now, in the present case, all that I have got is an absolute blank in Mr. King's recollection of the circumstances of the execution of this particular deed. I accept Mr. King's statement that he never meant to execute a mortgage; and I assume he was never told that the true effect of that deed was that it was a mortgage; but I have also the fact that he had absolute confidence in his solicitor, and executed any deed relating to his property that Eldred put before him. I apply to that state of things the Lord Justice's words: "When a man knows that he is conveying or doing something with his estate." The learned judge was a most accurate man; and when he said "doing something," he meant to make a general statement not restricted to a conveyance, or mortgage, or any particular sort of deed. A man who executes a deed put before him by his solicitor knows that he is "doing something" to which that deed relates; and, on the evidence before me, I can come to no other conclusion than that Mr. King knew he was doing something with his property when that deed was put before him. He said in his evidence: "When Eldred told me to sign a deed in connection with my property, I did it." It is not necessary to find a confirmation of what Mellish L.J. said, but *Hunter* v. *Walters* (2) was followed by Chitty J. in the case of *Lloyd's Bank, Limited* v. *Bullock*. (3) Therefore, I hold that this deed is a valid deed

(1) L. R. 7 Ch. 88. (2) L. R. 7 Ch. 75.
(3) [1896] 2 Ch. 192.

as against Mr. King in the hands of Mr. Smith and his co-trustee.

Then comes the question on the 56th section of the Conveyancing Act. It is argued that Eldred had no authority to receive the money. Apart from the section he would not have had such authority; but the Act of Parliament was passed in the interests, I suppose, of the public at large, and for the convenience of business, giving a general statutory authority to a solicitor who produces a deed to receive the consideration where the deed has "in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration . . . . without the solicitor producing any separate or other direction." Now, I have heard an argument as to what "a solicitor" means. It is not necessary for me to determine whether "a solicitor" means, for the purposes of the Act, "any solicitor," or whether it means "a solicitor authorized to act for the party to be charged." It appears to me, for the purposes of this case, that it is sufficient to say that the same principle which makes the deed binding as a conveyance affecting the estate, and binding on the plaintiff, also makes the receipt operative and effectual under the section. I have already held that Eldred, acting as the solicitor of the plaintiff, obtained the execution of this deed by him in such a manner that the defendant was entitled to act upon it; that deed has a receipt on it; and it follows, in my opinion, that the plaintiff cannot be heard to say that any part of that deed, including that receipt, was not executed by him on the suggestion of his solicitor, and handed over to his solicitor. That being so, I find as a fact that the plaintiff is estopped from saying that it is not his solicitor who produced the deed. There is a good deal to be said in favour of the proposition that "a solicitor" who produces a deed means, what the section says, "a solicitor"; if this is not so, it is difficult to see the object of passing an Act rendering it necessary for a purchaser to see the evidence of the retainer of the solicitor instead of his authority to receive

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the money. It looks rather like a trap for the unwary public. To some extent North J. has dealt with this point in the case of *Day* v. *Woolwich Equitable Building Society*. (1) I do not think he really decided anything at all on the section, because the learned judge found as a fact that the solicitor who received the money in that case was not the solicitor at all for the mortgagor, but was the solicitor for the mortgagee. The mortgagee, acting through a solicitor, handed over to him the money to pay over to the mortgagor. And, moreover, he found as a fact that the deed never was produced at all. So far as that decision goes, therefore, there is nothing to bring it within the Act at all. He does say, at the bottom of p. 493: "The view I take of the section is, that the person producing the deed must be a solicitor acting for the party to whom the money is expressed to be paid." It is not necessary for me to say whether the words "acting for" mean "actually retained for," or whether "purporting to act for" is sufficient. I observe Messrs. Hood and Challis, in their note on s. 56, say (Hood and Challis on the Conveyancing Acts, 5th ed. p. 138): "In the absence of anything to suggest the contrary, it seems that the person paying the money may, and indeed, is bound to, assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge." That proposition seems to be sound, for, if it were not so, it is obvious that the person to whom the deed is produced might be put in the very awkward position of having to choose between the risk of losing his money, and the risk of having to pay the costs of an action for specific performance, if the Court should hold that he ought to have accepted the deed produced by the solicitor as giving authority for payment to the solicitor. However, it is not necessary to determine that. I decide this case on the ground I have already mentioned, namely, that, on the evidence, there was authority given to the solicitor in such a way that the plaintiff is estopped from denying it; the deed binds him as a valid deed passing the estate, and it also binds him as a deed into which he has put

(1) 40 Ch. D. 491.

his receipt, the circumstances being the same, and the same solicitor producing it. That being so, the plaintiff's case fails, and must be dismissed with costs.

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Solicitors for plaintiff: *Goldberg, Barrett & Newall, for A. J. O'Connor, Birmingham.*

Solicitors for defendants: *Sherwood & Balls.*

H. L. F.

In re BORN. CURNOCK *v.* BORN.

FARWELL J.
1900
June 20.

[1896 B. 4595.]

Solicitor—Lien—Charging Order—Fund in Court—Property recovered for Company—Application after Winding-up—Delay—Discretion—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Delay by a solicitor in applying under s. 28 of the Solicitors Act, 1860, for an order charging his costs on property recovered by him is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.

Solicitors employed by a limited company recovered a claim against an estate in course of administration by the Court. The company was subsequently wound up by the Court. Shortly after the winding-up order was made, the solicitors applied for an order charging their costs on the company's share of the fund in court to the credit of the administration action:—

Held, that, as the charging order in this case conferred no new right, but was only a cheap and speedy mode of enforcing the common law lien on the company's share of the fund in court, which lien existed prior to the winding-up, the Court, in the exercise of its discretion under the statute, would make the order.

SUMMONS.

The above action was a creditors' action for the administration of the estate of G. E. Born, deceased, and the present summons was an application by solicitors formerly employed by a limited company in prosecuting and recovering a claim against the estate for an order charging their costs on the company's share of the fund in court to the credit of the above action.

The claim was made and duly admitted in the above action

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in January, 1897. In June, 1897, the company closed their office and ceased to carry on business. On July 28, 1899, the company's name was struck off the register under the Companies Act, 1880 (43 Vict. c. 19), s. 7. On March 14, 1900, a winding-up order was made on the application of a creditor.

On March 19, 1900, the present summons was issued by leave of the winding-up Court.

It was stated that the order, if made, would give the applicants priority to the other creditors of the company, and to the costs and expenses of the petitioning creditor and the official receiver.

Maugham, for the applicants. The applicants ask for a statutory charge as the most convenient mode of enforcing their common law lien on the company's share of the fund in court. This lien existed prior to the winding-up, and is unaffected thereby. It is not abrogated by the statute: Cordery on Solicitors, 3rd ed. p. 374; *Haymes* v. *Cooper* (1); *Ex parte Morrison* (2); *In re Wadsworth.* (3)

W. H. Cozens-Hardy, for the official receiver. The applicants are not really seeking to enforce their common law lien, but to obtain a new charge under the statute. They have no absolute right to this, as the jurisdiction is purely discretionary: *Greer* v. *Young* (4); *In re Humphreys.* (5) The Court must be satisfied that the order is a just and proper one to make: *Harrison* v. *Harrison* (6); and will have regard to the applicants' delay: *Roche* v. *Roche.* (7)

[FARWELL J. In that case other rights had intervened.]

Here a winding-up has intervened, which, though not affecting the prior common law lien, prevents the subsequent acquisition of a statutory lien: *In re Capital Fire Insurance Association.* (8) Unless reasonable diligence is used, a common law lien is lost: *The Europa.* (9)

The charging order is in the nature of an execution, and

(1) (1864) 33 Beav. 431.
(2) (1868) L. R. 4 Q. B. 153.
(3) (1885) 29 Ch. D. 517, 520.
(4) (1883) 24 Ch. D. 545, 557.
(5) [1898] 1 Q. B. 520, 526.
(6) (1888) 13 P. D. 180, 185.
(7) (1892) 29 L. R. Ir. 339.
(8) (1883) 24 Ch. D. 408.
(9) (1863) Br. & L. 89; 2 Moo. P. C. (N.S.) 1.

subject to prior equities: *In re Wadsworth.* (1) To make a charging order after a winding-up would, therefore, be contrary to the spirit of s. 163 of the Companies Act, 1862, and the Court should accordingly refuse the application.

Maugham, in reply.

FARWELL J. It is clear on the authorities that the applicants have no absolute right to a charging order under s. 28 of the Solicitors Act, 1860, but that the Court has a discretion in the matter, which it must exercise according to the circumstances of the particular case. In the present case it has been contended that I ought to refuse the order on the ground of the applicants' delay in issuing their summons. But the mere lapse of time from January, 1897, when the claim was made and admitted, to March 19, 1900, when the summons was issued, is immaterial, seeing that the company closed their office and ceased to carry on business in June, 1897, and that no intervening rights have arisen. Unless other rights intervene, the question of delay has no bearing on the point.

It is also contended that, having regard to the winding-up, I ought not now to give the applicants a charge under the statute. But though this application is under the statute, it is very material to consider whether, if I make a charging order, I am thereby giving the applicants a new right, or merely enabling them more cheaply and speedily to enforce a right they already possess. Now, it is plain that they have a common law lien on the company's share of the fund in court for the amount of their costs. It would be monstrous if this were not so, as the company would never have recovered the money without their exertions. It resembles the case of debenture-holders who have to allow a liquidator's costs when they take the benefit of his exertions, and it is clear that justice calls for such a lien.

Now, this common law lien has not been abrogated by the statute—*Haymes* v. *Cooper* (2)—or affected by the winding-up, and all I am really asked to do is to give the statutory charge in aid of the already existing common law lien, which is prior to any right of the official receiver or liquidator. I express no

(1) (1886) 34 Ch. D. 155, 158. (2) 33 Beav. 431.

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opinion on cases where there is no common law lien. The statutory charge is in no sense an execution under s. 163 of the Companies Act, 1862.

I think I ought to make the order; and as no extra costs have been occasioned by the applicants' adoption of this mode of enforcing their common law lien, I give them their costs.

Solicitors: *Edwin Andrew, White & Wattson; J. W. Browne.*

G. R. A.

FARWELL J. 1900 *June* 20.

In re WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY.

[1897 W. 0124.]

Railway—Receiver and Manager—Preferential Payments—Working Expenses—Proper Outgoings—Damage caused by Defective Plant—Compensation—Costs—Judgment Debt—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

A judgment debt for damages caused to the property of a person using a railway by the neglect of the railway company to keep its plant in proper repair is not a working expense or other proper outgoing of the railway within the meaning of s. 4 of the Railway Companies Act, 1867, so as to be entitled to priority over other debts payable by a receiver and manager appointed under that section.

The costs carried by the judgment stand on the same footing as the damages in this respect.

The priority given by the section is confined to working expenses and other proper outgoings without which it would be impossible to carry on the railway. It does not extend to claims for compensation or other claims, the non-payment of which, though probably leading to a decline in traffic, would not absolutely paralyze the undertaking.

In re Eastern and Midlands Ry. Co., (1890) 45 Ch. D. 367, *In re Wrexham, Mold and Connah's Quay Ry. Co.*, [1900] 1 Ch. 261, and *In re Navan and Kingscourt Ry. Co.*, (1885) 17 L. R. Ir. 398, followed.

SUMMONS.

This was a summons by judgment creditors of the above railway company asking that the receiver and manager thereof might be ordered to pay the judgment debt of 63*l.* 17*s.* 2*d.* to the applicants out of the assets of the company.

The receiver and manager was appointed on September 8,

1897, on a creditors' petition under s. 4 of the Railway Companies Act, 1867. (1)

On December 4, 1899, the applicants, having sustained damage to a ship loading goods at the company's wharf owing to the defective state of the berth, recovered judgment against the company and the receiver for 30*l*. damages and 33*l*. 17*s*. 2*d*. costs. The action was based on the implied contract to keep the wharf and berth in proper repair.

The amount not having been paid, the applicants issued the present summons on March 19, 1900.

Hon. J. W. Mansfield, for the applicants. The amount claimed is either a working expense or a proper outgoing. Repairs to plant clearly fall under one of those heads, and compensation for damage arising from want of repair is ejusdem generis.

[FARWELL J. Would compensation for damage under Lord Campbell's Act (9 & 10 Vict. c. 93) (2) be a working expense or proper outgoing, if a fatal accident arose from the negligence of a signalman paid by the company?]

That might be so, but that case is rather different. The company would have done their duty in paying the signalman, and damage arising from his neglect might not be ejusdem generis with working expenses or proper outgoings. In the present case the damage arises directly from the non-expenditure of the proper outgoing necessary to repair the berth. That is a breach of contract for which the company

(1) Sect. 4 of the Railway Companies Act, 1867, prohibits the rolling stock and plant of a railway company open for public traffic being taken in execution by a judgment creditor, and continues: "But the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery . . . . and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; . . . ."

(2) The official short title is now the Fatal Accidents Act, 1846.

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are directly responsible. Again, working expenses and proper outgoings are those without which the railway cannot be carried on: *In re Eastern and Midlands Ry. Co.* (1); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2) The present claim satisfies that test. No trader would employ a railway which did not pay such a claim in full, just as no one would entrust goods to a railway if the only compensation for loss was the remote chance of a dividend after debenture interest was paid. It is every-day practice to pay small claims of this kind without litigation. Surely the receiver has the same power.

[FARWELL J. That argument goes to the expediency of the payment, but the Act points to expenses and outgoings without which it is impossible to carry on the railway, such as instalments payable for rolling stock under the hire-purchase system: *In re Cornwall Minerals Ry. Co.* (3); secus, a debt for rails supplied for making the line: *In re Navan and Kingscourt Ry. Co.* (4)]

In any case the Court can allow payment of the costs of obtaining the judgment, as the action was presumably defended for the benefit of the general body of creditors: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2)

[FARWELL J. The costs allowed in that case were the costs of the company, and they were treated as incurred in prosecuting the inquiries directed by the order appointing the receiver. The present costs are part of the judgment debt. If they have priority, every creditor ought to have priority for the costs of proving his claim, but that proposition is clearly untenable.]

A liquidator would have to pay the costs of defending such an action, and the same rule should apply to a receiver.

Mark Romer, for the receiver and manager, was not called on to argue.

FARWELL J. This is an application of some novelty and of some ingenuity. The applicants, having recovered judgment

(1) 45 Ch. D. 367, 385.
(2) [1900] 1 Ch. 261.
(3) (1882) 48 L. T. 41.
(4) 17 L. R. Ir. 398.

against the company and the receiver for damages for breach of their implied contract to keep their wharf and berth in proper repair, seek to have priority for the damages so recovered over all the other creditors of the company under the 4th section of the Railway Companies Act, 1867. The reason of the passing of that Act has been explained by Kay J. and other judges before now. It was to enable a railway company, against which a creditor had obtained judgment for his debt, to carry on its business as a going concern, notwithstanding the judgment, partly for the benefit of the public and partly for the benefit of the creditors, who were thereby more likely to get paid than if the whole undertaking was broken up and sold. The object being to protect the rolling stock and plant of the company from execution by the judgment creditor, and, further, to keep the undertaking alive, it was obviously necessary to provide for all expenses and outgoings which were absolutely essential for that purpose. A railway cannot, of course, be carried on without paying for coal, wages, and other necessary expenses. The Legislature, therefore, while protecting the rolling stock and plant against the claims of judgment creditors, enabled the Court to appoint a receiver and manager who would take into his possession the gross receipts of the railway, and thereout would first of all pay, in priority to everything else, the working expenses and other proper outgoings in respect of the undertaking. As expressed by Kay J. in *In re Eastern and Midlands Ry. Co.* (1) and explained, and perhaps a little varied, by the Court of Appeal in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2), the section points to an expense or outgoing which may be called a sine quâ non to the continued existence of the undertaking as a going concern. In *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2) the Court of Appeal did not altogether approve of certain expressions of Kay J. in *In re Eastern and Midlands Ry. Co.* (1) implying that "proper outgoings" added nothing to "working expenses." I do not think that is what he meant, and indeed he appears to draw a distinction between them at p. 386 of his judgment. It is obvious that "working expenses" are one

(1) 45 Ch. D. 367, 385. (2) [1900] 1 Ch. 261.

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thing, and "other proper outgoings" are another thing. Rates and taxes, for instance, fall exclusively under the latter head. The question before the Court of Appeal in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) was one relating to the costs incurred by the company in defending certain proceedings in respect of a very large claim which they defended under the direction of the Court, and the Court thought those costs might be allowed, although they held that they were neither working expenses nor proper outgoings. However, that case does not really affect the point now before me.

The principle which has been laid down by the Courts is summed up shortly by Chatterton V.-C. in *In re Navan and Kingscourt Ry. Co.* (2): "The Act plainly intended that expenses, such as common sense will shew to have been for the working of the railway and for the outgoings necessary to enable it to do its service to the public efficiently, should be paid in the first place, and all the surplus applied to payment of all the debts of the company, properly so-called, according to their respective rights and priorities, to be ascertained by the Court." The applicants have argued the case as though I was refusing to allow their claim to be admitted to proof at all. That, of course, is not the case. It is simply a question of priority. I have already expressed my view as to the way the Act of 1867 interferes with the rights of judgment creditors generally, and I can see no reason why creditors who recover damages for breach of contract should be put in any better position than ordinary judgment creditors. The applicants have raised two ingenious points. First of all they said, "This is a matter which has arisen from the neglect of the company to expend money in proper outgoings. If they had paid the workmen's wages and paid for materials to put the berth in proper repair, this accident never would have occurred. We have suffered damages by the fact that they failed to make a proper expenditure by way of outgoings, and, therefore, we ought to have those damages." This alters the word "outgoings" into "damages for failure to pay outgoings," and would extend to damages for compensation under Lord

(1) [1900] 1 Ch. 261. (2) 17 L. R. Ir. 398, 405.

Campbell's Act for the death of a passenger by an accident. I can only say that, in my opinion, to admit such a claim as that would be entirely to disregard the words of the Act and the purpose for which it was passed. That brings me to their second point, which was this. They said, "If railway companies do not pay this sort of claim they may as well retire from business, because nobody will employ them." That may or may not be so. The Act, however, was intended to provide against the physical impossibility of carrying on a railway as a going concern for want of rolling stock and plant, which would be the case if the judgment creditors were allowed to come and seize all the rolling stock and plant. That would lead to an absolute physical impossibility, but the case put by the applicants only leads to a moral improbability. No doubt if a railway company do not pay damages, caused by defective plant, or if they lose a man's goods in transit and do not pay for them, the chances are that the customer will not employ them again; but that difficulty is not a physical impossibility like that arising from the seizure of rolling stock or plant, which is the difficulty aimed at by the Act. It is simply a probability that a man will not employ a line which does not pay that compensation. It is not a question of physical impossibility at all. The argument, therefore, has no bearing or force as applied to the present state of circumstances.

I see no reason for making any difference between the costs of the action and the damages. The costs have now become a judgment debt, and stand exactly on the same footing as the damages. They certainly cannot by any fair rendering of the words be held to be working expenses or other proper outgoings with respect to the undertaking.

The application, therefore, fails, and, inasmuch as it is an attempt to get priority over the other creditors of the company, I can only dismiss it with costs.

Solicitors: *Wynne, Holme & Wynne, for H. Forshaw & Hawkins, Liverpool; Cunliffes & Davenport, for Lingards, Manchester.*

G. R. A.

WRIGHT J.

1900

May 30;
June 14.

In re FARMER'S UNITED.

STEPHENSON'S CASE.

[0084 of 1900.]

Company—Winding-up—Shareholder—Fully paid Shares—Omission to File Contract—Costs—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 *&* 62 *Vict. c.* 26).

Where, after a winding-up has commenced, relief has been granted to a shareholder under the Companies Act, 1898, the terms, if any, imposed as a condition of obtaining the relief are in the discretion of the Court, to be exercised according to the circumstances of each case.

And where the payment of the liquidator's costs is made a condition of obtaining relief, there is no general rule as to whether the costs ought to be as between solicitor and client or party and party; but in determining this question the Court will have regard to the assistance given to the liquidator by the applicant and the reasonableness of opposing the application.

THE Farmer's United, Limited, in 1899 passed an extraordinary resolution for voluntary winding-up and appointing a liquidator, and in March, 1900, on an originating summons taken out by him, an order was made giving liberty to apply generally in the liquidation. Subsequently the liquidator took out a summons for an order that G. E. Stephenson and others, who were alleged to be contributories of the company, might be ordered to pay the amounts alleged to be due from them in respect of a call made by the liquidator. Stephenson thereupon served on the liquidator a notice of motion under the Companies Act, 1898, for an order that there might be filed with the Registrar of Joint Stock Companies a contract in writing dated April 10, 1899 (with reference to the issue, to the vendor of a certain business taken by the company, as fully paid up, of shares in the company of which those held by Stephenson formed part), or in the alternative that a memorandum in writing in such form as the Court might approve might be filed with the registrar, and a direction that on such contract or memorandum being filed within a period to be specified in the order it should, in relation to the shares issued

to Stephenson, operate as if it were a sufficient contract in writing within the meaning of s. 25 of the Companies Act, 1867, and had been duly filed with the registrar before the issue of the shares. The agreement had not been filed, but Stephenson, who had paid the vendor the par value of the shares, and taken an allotment as his nominee, was not aware of the omission to file it.

The motion was adjourned into court and heard before Wright J. on May 30, 1900.

Eve, Q.C., and *Gore-Browne*, for the applicant.
C. A. Russell, Q.C., and *Sington*, for the liquidator.

WRIGHT J. held that Stephenson ought to be relieved from liability as a contributory, but on the terms that he should pay the costs of the liquidator; and with reference to whether the costs should be as between party and party or solicitor and client his Lordship said he would, before giving his decision, consult some of the other judges of the Chancery Division.

June 14. WRIGHT J. In this case an application was made under the recent Act for relief in respect of liability on shares issued as fully paid up, but without the proper filing of the contract under the Companies Act, 1867. I granted the relief on the terms that the applicant should pay the costs, and the question remaining to be decided was whether he ought to pay the costs as between solicitor and client or as between party and party. I do not see my way to establishing any general rule. The Act seems to me to intend that terms shall be imposed according to discretion in each case upon its own circumstances. Applicants ought to give the liquidator in good time the most plenary and candid assistance to enable him to judge whether he should go to the expense of opposing the application for relief. When the applicant does not give such assistance, I should incline to say that the liquidator, as protector of the creditors as well as of the shareholders, ought to be fully indemnified against costs reasonably incurred, though even in an order allowing solicitor and client costs I think some

WRIGHT J. 1900 STEPHENSON'S CASE.

control over the taxation should be reserved, so that the discretion to be exercised may in all respects be that of the Court. When the applicant does give such assistance and it is established that the liquidator was wrong in resisting the application, the liquidator ought not to have costs beyond any costs necessarily incurred in testing the statements made and in watching the hearing of the application—which may be very small.

In the present case I think only party and party costs ought to be paid.

Solicitors for applicant: *E. Flux & Leadbitter, for T. Jones, Wednesbury.*

Solicitor for liquidator: *C. W. Brown.*

F. E.

RICE *v.* NOAKES & CO.

C. A.
1900
June 26, 27.

[1898 R. 1943.]

Mortgage—"Clog" on Redemption—"Tied" Public-house—Mortgage of Leasehold Public-house—Covenant by Mortgagor to take Beer during the Term from Mortgagee only.

The rules "once a mortgage always a mortgage," and that the equity of redemption of a mortgage must not be "clogged," are still in force, and the meaning of them is that a mortgagor on payment of the debt secured by the mortgage is entitled to have the mortgaged property restored to him in its entirety, unfettered, and undiminished in value.

In a mortgage of a leasehold public-house by a licensed victualler to brewers the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not during the continuance of the term, and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees:—

Held, that this covenant was a "clog" on the equity of redemption, and that the plaintiff, on payment of all that was due upon the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the "tie."

Decision of Cozens-Hardy J., [1900] 1 Ch. 213, affirmed.

Santley v. *Wilde*, [1899] 2 Ch. 474, explained and distinguished.

APPEAL against the decision of Cozens-Hardy J. (1)

The plaintiff, a licensed victualler, in October, 1897, became the purchaser of property at Camberwell, including a public-house known as the King's Arms, held under a lease for a term expiring at Christmas, 1923.

Prior to his purchase the defendants, Noakes & Co., brewers, had a mortgage on the property, the terms of which were in substance identical with those of the mortgage of 1897 hereafter stated. The defendants were not the vendors, but they released their security in order to enable Messrs. Nicholson, the second mortgagees, to sell the property to the plaintiff for 6800*l.*

In order to enable the plaintiff to make the purchase, the defendants Noakes & Co. advanced 4850*l.* to him on the security of a first mortgage of the property. This mortgage was dated

(1) [1900] 1 Ch. 213.

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October 7, 1897. It contained a recital that Noakes & Co. had agreed to lend to the plaintiff the sum of 4850*l.* upon having the repayment thereof, and of such other moneys as were thereinafter mentioned, secured in manner thereinafter appearing; and it was witnessed that, in consideration of 4850*l.* then lent to the plaintiff by Noakes & Co., and for securing the payment to the defendants of the said principal sum and all such further sums as were thereinafter mentioned, the plaintiff demised and conveyed to the defendants the leasehold premises, and all trade and tenant's fixtures, and the goodwill of the business of a licensed victualler or other business carried on upon the said premises, and the full benefit and advantage of all certificates and the magistrates' and excise licences for carrying on such business or relating to the said premises, to hold to the defendants subject to a proviso for redemption thereinafter contained. By this proviso it was declared that, if the plaintiff should, either on demand by the defendants left at the demised messuage, or without such demand, pay to them all such principal moneys and interest as were respectively mentioned in the covenant for payment thereinafter contained, and as should then be due on the security, the defendants would, at the request and cost of the plaintiff, surrender or reconvey the premises to the plaintiff or as he should direct. And (after attorning tenant at a peppercorn rent if demanded) the plaintiff covenanted with the defendants that he would on demand pay to them the said principal sum with interest at 5 per cent. per annum until payment, and all such further sums as should be due from the plaintiff, as well for money advanced to or for the use of the plaintiff, or paid on his behalf as therein mentioned, or on any other account or otherwise howsoever, with interest at the rate aforesaid, as also for goods sold and delivered by the defendants to the plaintiff.

The deed contained the following covenant: "And for the considerations aforesaid the mortgagor, so as to charge the premises . . . . hereby demised into whosesoever possession the same may come, whether by act of the party or by operation of law or by any other ways or means however, and to the further intent that the obligation of this covenant may

run with the land, doth hereby covenant with the company that the mortgagor shall not nor will, at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors, except such as shall be bonâ fide purchased by the mortgagor of the company. And, further, that, if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the company the sum of 1000*l.* as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." The deed also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively.

The plaintiff was willing to pay off all money due to the defendants on the security of the mortgage, and he required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the whole currency of the lease, or to transfer the mortgage to him and assign to him the benefit of the covenant.

The defendants were willing to reconvey or transfer, but not to release or assign the covenant, and the action was brought to obtain a declaration that the plaintiff was entitled, not only to a reconveyance or transfer, but also to a release or assignment of the covenant.

Cozens-Hardy J. held that, on payment of all moneys due upon the security, the plaintiff was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the "tie."

The defendants appealed.

Haldane, Q.C., *Eve, Q.C.*, and *Stanley Fisher*, for the defendants. The question is whether the bargain made by this mortgage is a "clog" on the equity of redemption, which,

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it is admitted, is invalid, or is simply a stipulation giving a collateral advantage to the mortgagees, which is permissible, provided there has been no oppression of the mortgagor: *Santley* v. *Wilde* (1); *Biggs* v. *Hoddinott* (2); *Mainland* v. *Upjohn*. (3) The stipulation in the mortgage deed was not a clog on the redemption, but was in the nature of a collateral bargain, and was in fact part of the consideration for the parties entering into the transaction of loan. The plaintiff was aware, when he bought the house, that there had been a "tie" and that it was to be reimposed; so that there was no oppression or unconscionable bargain. There is nothing illegal in stipulating that a mortgagor shall be precluded from redeeming for a certain period: *Teevan* v. *Smith*. (4) *Salt* v. *Marquess of Northampton* (5) does not touch the point in the present case.

Astbury, Q.C., and *E. Beaumont*, for the plaintiff. The real question is this: Is it a valid provision in a mortgage that on payment of principal, interest, and costs the mortgagor is not to get his property back except in a form different from that in which he originally had it? No case has decided that, on payment by the mortgagor of the whole sum secured, the mortgagee may continue to have a hold upon the property.

[LORD ALVERSTONE M.R. How do you say this transaction is clogging your equity of redemption?]

The effect of it is that the plaintiff will get his property back, not as a free house, as it was when he mortgaged it, but with an equitable charge or incumbrance upon it, as in *Haywood* v. *Brunswick Permanent Benefit Building Society*. (6) Anything is a "clog" which prevents the mortgagor from getting back his property in its original form when he has discharged the mortgage obligation. *Santley* v. *Wilde* (1), on which the defendants rely, was decided on the authority of *Biggs* v. *Hoddinott*. (2) Without saying that *Santley* v. *Wilde* (1) is wrong, it must be observed that in *Biggs* v. *Hoddinott* (2) the "tie" was limited to the duration of the mortgage, and ceased

(1) [1899] 2 Ch. 474.
(2) [1898] 2 Ch. 307.
(3) (1889) 41 Ch. D. 126.
(4) (1882) 20 Ch. D. 724, 729.
(5) [1892] A. C. 1.
(6) (1881) 8 Q. B. D. 403.

the moment the mortgagor came to redeem; but here the "tie" is to continue notwithstanding the redemption of the mortgage. It is not disputed that the old rule laid down in *Jennings* v. *Ward* (1) and other cases, that a mortgagee could not stipulate for any collateral advantage, went too far; but the true principle is clearly stated by Lindley M.R. in *Santley* v. *Wilde* (2) thus: that a security is redeemable on the performance of the obligation for which it was given: if the obligation is the payment of a debt, then on payment of the debt; and that is what is meant when it is said there must not be a clog or fetter on the equity of redemption. The law is settled by *Salt* v. *Marquess of Northampton* (3), and has not been altered by *Santley* v. *Wilde*. (4) In *Salt* v. *Marquess of Northampton* (3) the House of Lords assumed that the equity of redemption could not be clogged. The real question was whether the rule applied under the circumstances of that case. In *Santley* v. *Wilde* (4) the Court did not dispute that rule, but they held that the mortgage was a security for the payment of a share of the profits of the theatre during the leasehold term as well as for the sum advanced by the mortgagee. The Court professed to be following *Biggs* v. *Hoddinott*. (5)

Haldane, Q.C., in reply. In *Salt* v. *Marquess of Northampton* (3) the real question was whether the policy of insurance formed part of the mortgage security. A mortgagee cannot stipulate that the mortgagor shall not be entitled to redeem the mortgage, but he can stipulate for a collateral advantage as part of the consideration for the mortgage. *Santley* v. *Wilde* (4) shews that this is so, and it was much stronger than the present case. The question is, were there two bargains or one? If there are two, they may just as well be comprised in one piece of paper or parchment. In the present case the house was mortgaged subject to the "tie."

LORD ALVERSTONE M.R. This case is one of very great importance, and I am glad to think that the interest of the

(1) (1705) 2 Vern. 520.
(2) [1899] 2 Ch. 475.
(3) [1892] A. C. 1.
(4) [1899] 2 Ch. 474.
(5) [1898] 2 Ch. 307.

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parties is such that in all probability we shall have in future the guidance of the House of Lords upon the point. I approach the consideration of the question with some trepidation, because expressions and arguments have been used on both sides which might possibly tend to frighten if not to intimidate one member of the Court. But I have endeavoured to grasp the real meaning of those expressions, and I will explain as clearly as I can what I understand the doctrines of the Court to be. [His Lordship stated the facts, and continued :—]

The deed of October 7, 1897, was on the face of it a mortgage of the premises without any tie upon them, and there was a proviso for reconveyance on payment of the mortgage debt and interest; but the deed contained a covenant, upon which a very important question arises, whereby the mortgagor, it being expressly stated that the obligation of the covenant was intended to run with the land, covenanted with the mortgagees that he "shall not, nor will at any time during the continuance of the term aforesaid"—which I take to mean the whole term of the lease extending up to 1923—"and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises, any malt liquors, except such as shall be bonâ fide purchased by the mortgagor of the company." In other words, this covenant purported to tie the house to the brewers up to the end of the year 1923, and purported to tie the house in the hands either of the mortgagor or of his assigns for the whole period of the term. The question is whether that covenant in the mortgage can stand. I have endeavoured to make myself acquainted with the history of this matter, and it seems to me impossible to say that the doctrine which has been spoken of as "clogging the equity of redemption" can now be disregarded by the Courts, or that it has disappeared in consequence of subsequent decisions. Indeed, Mr. Haldane did not contend that. His main argument was that this covenant is not a clog on the equity of redemption. I will refer to the way in which the rule was expressed by a

great common lawyer, Bowen L.J., who was the dissentient judge in *Marquess of Northampton* v. *Pollock* (1), and his statement of the rule was approved by the House of Lords when the same case came before them under the name of *Salt* v. *Marquess of Northampton*. (2) Bowen L.J. said (3): "Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own." I could not hope to express the proposition more clearly. I understand it to mean that on redemption the mortgagor is entitled to have back that which he mortgaged, and that anything which would prevent his getting it back when his obligation as mortgagor is discharged will not be permitted, upon the ground that it would fetter or impede his right to redeem. The language of Bowen L.J. was expressly approved in the House of Lords by Lord Bramwell, who stated the same proposition in somewhat different language. But it is important to observe that in *Salt* v. *Marquess of Northampton* (2) no doubt whatever was thrown upon the general principle, and so much was it taken for granted that Lord Selborne in his judgment did not discuss it at all, and the whole discussion seems to have proceeded upon the question whether under the very special circumstances of that case the general rule did or did not apply—whether the parties could there be held to the terms of their contract notwithstanding the existence of a general rule. Therefore, I approach the consideration of the present case, adopting the view as expressed by Bowen L.J. that the old rule still applies.

Now, is it true that the covenant now in question does not impair the property which the plaintiff, the mortgagor, is entitled to have returned to him on the redemption of the mortgage? Does it or does it not clog the equity of redemption? I think, upon the authorities, the covenant would in ordinary circumstances run with the land; but at any rate, if it is binding, its effect is that up to 1923, even if the

(1) (1890) 45 Ch. D. 190. (2) [1892] A. C. 1.
(3) 45 Ch. D. 215.

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mortgage debt is paid off—that is, for a period of nearly twenty-four years—the owner of the property will not be able to occupy it and use it as a public-house, obtaining beer in the best market, but will be bound to obtain beer from the mortgagees only. However you regard it, it seems to me impossible to come to the conclusion that that stipulation does not diminish or affect the value of the property originally mortgaged, and which is to be reconveyed on repayment of the mortgage debt. Whatever may be the proper expression, in my opinion, the covenant impairs or affects the mortgaged property so that the mortgagor will not get it back on redemption. It impedes his right to redeem and rescue that which was his own at the time when he mortgaged it. That being so, unless there has been an alteration of the old rule by any decision which is binding upon us, I should have thought the case was fairly clear. So far as I can gather from the notes to *Howard* v. *Harris* (1), there are many other cases in which this principle has been applied; so that I think it would be very difficult, even if there were not the recent judgment of the House of Lords in *Salt* v. *Marquess of Northampton* (2), to contend that the principle does not still apply.

But it is said that the course of recent decisions, ending with *Santley* v. *Wilde* (3), has laid down rules binding upon us which shew that this particular covenant is not one which affects the equity of redemption, but that it must be regarded as a collateral bargain which can therefore be enforced. One of those cases is *Mainland* v. *Upjohn*. (4) I am not sure whether in early days such a stipulation as was there made would have been held legal, probably not before the usury laws were abolished. In that case a mortgagee obtained further advantages in the shape of commissions and bonuses deducted by him at the time of making the advances, and those sums were allowed to him on taking the account in a redemption action. That case is clearly distinguishable from the present case, on the ground that there was a further money considera-

(1) (1683) 1 Vern. 190; 2 W. & T. 7th ed. p. 11.
(2) [1892] A. C. 1.
(3) [1899] 2 Ch. 474.
(4) 41 Ch. D. 126.

tion in respect of the transaction of mortgage. It is said that *Biggs* v. *Hoddinott* (1) carried the matter further; I doubt whether it did. There the stipulation was that the money should not be called in for five years. Whether that provision would or would not have been treated in the old days as a proper one it is not worth while stopping to consider. The Court of Appeal decided, and I can see no reason for expressing the slightest dissent, that the bargain fixing a term within which the mortgage money should not be called in, and that the mortgagor should agree to purchase his beer only from the mortgagee during the continuance of the mortgage, was perfectly reasonable. But, if I have correctly stated the facts of that case and the ground of the decision, it is obvious that the contract did not affect the property when redeemed, or could be said in any way to clog the equity of redemption, or to interfere with the rights of the mortgagor on redemption.

Santley v. *Wilde* (2), I admit, is much more difficult to deal with, and, if it had decided that such a covenant as that which is now in question did not clog the equity of redemption, we should, of course, be bound by it. Speaking for myself, I should have had a difficulty in arriving at the same conclusion as the Court of Appeal did in *Santley* v. *Wilde* (2) on the facts of that case. But for the present purposes it is only important to see that we are not departing from any material rule or principle laid down in *Santley* v. *Wilde*. (2) When that judgment of the Court of Appeal is understood, I do not think it either purported to infringe or did in any way infringe on the doctrine recognised by the House of Lords in *Salt* v. *Marquess of Northampton*. (3) The plaintiff, Miss Santley, who was intending to open a theatre, mortgaged the lease of the theatre, and by the mortgage she agreed to repay the principal with interest by quarterly instalments extending over five years, and to pay the mortgagee a third of the profits of the theatre during the whole of the remaining term of the lease, which had more than nine years to run. No doubt the profits would or might arise after the mortgage money had been repaid. But, as I

(1) [1898] 2 Ch. 307. (2) [1899] 2 Ch. 474.
(3) [1892] A. C. 1.

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read the judgments of the Court of Appeal, they considered that the profits would not issue out of the equity of redemption, but they thought it was a term of the mortgage that the property should be a security for the profits as well as for the 2000*l.* advanced. Lindley M.R. said (1): "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law." And he also said (after referring to the terms of the agreement) (2): "That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the 2000*l.* and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given." The declaration made by the Court (which I confess I did not, until I had studied the case, understand) was that the defendant was entitled to hold the mortgage during the residue of the term, notwithstanding that all principal and interest had been paid, "as a security for a sum equal to one-third part of the clear net profit rents." In other words, the Court construed the contract as meaning that the property should be charged for a period of nearly ten years with an obligation to pay the share of the profits as well as the mortgage debt. If that be so, it is clear that the Court did not attempt to infringe on, still less to do away with the main principle. They came to the conclusion that on the face of the contract the lease was intended to be charged with and to be security for the profits; but they did not intend to say that when the mortgagor had discharged her obligation the property could still be held for the benefit of the mortgagee. That this is the true view of the case is made clear, at any rate so far as the other two members of the Court, Sir Francis Jeune and Romer L.J., are concerned, because

(1) [1899] 2 Ch. 474. (2) [1899] 2 Ch. 476.

they both considered that they were following *Biggs* v. *Hoddinott* (1), in which, as I have already said, the collateral privilege conferred on the mortgagee was to last only during the term of the mortgage. This distinction was pointed out by my brother Cozens-Hardy J. He said (2) (referring to *Santley* v. *Wilde* (3)): "If I rightly understand the judgment of the Court of Appeal, it established that a mortgage of leasehold property expressed to be a security for the due discharge of future recurring obligations cannot be redeemed before those obligations have matured, even though the period covered by the obligations may or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case." That is the learned judge's view of the principle of the decision in *Santley* v. *Wilde*. (3) I have endeavoured to express my own view of the distinction in somewhat different language, though there is no difference in principle. In my judgment *Santley* v. *Wilde* (3), rightly understood, is no authority for holding that such a contract as this, which does affect the equity of redemption and prevents the mortgagor from getting his property back on redemption, can stand, having regard to the principle which the House of Lords so emphatically recognised in *Salt* v. *Marquess of Northampton*. (4)

It remains only to say a word upon the question of fact, which at one time seemed to me to create some difficulty. It was said that this house was really a tied house all through, and that in substance the transaction was that Rice, having bought only a tied house, mortgaged a tied house, and therefore was only entitled to get back a tied house on the redemption of the mortgage. On the face of the mortgage deed, if we are bound by its terms, the house is treated as being a free house; and, even assuming that there was the previous mortgage and that the defendants were entitled to refer to it, still it was a stipulation which could have been got rid of by the original lessee or mortgagee. That being the nature of the stipulation, I do not think the defendants are entitled to say that the plaintiff is to be considered as having taken the property

(1) [1898] 2 Ch. 307.
(2) [1900] 1 Ch. 218.
(3) [1899] 2 Ch. 474.
(4) [1892] A. C. 1.

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subject to a restriction of which he could not get rid. Therefore I do not think the defendants' position would be any better, even assuming that they are entitled to go to a certain extent behind the terms of the deed, and to say that the house must be considered to have been a tied house all the time, and to have been mortgaged as a tied house.

I need scarcely say that, dealing with a subject with which I do not pretend to be very familiar, with principles which I have not often had to apply, and with authorities which I have not often had to consider, I express my judgment with some doubt, not as to the decision, but as to whether I have properly appreciated all the arguments which have been addressed to us. I have, however, come to a very clear opinion that, the old doctrine still standing, this covenant is an infringement of it. I think that the judgment of Cozens-Hardy J. was right, and that the appeal should be dismissed.

RIGBY L.J. I agree entirely with what the Master of the Rolls has said, which appears to me in substance, though not in the same words, to recognise and affirm what was said by Cozens-Hardy J. I will not go into detail. I will only indicate the principles which I conceive to underlie this and similar cases. In the first place, the maxim "once a mortgage always a mortgage" has not been in any degree infringed upon. Such a maxim is convenient to refer to, but it must of course be applied very carefully to the facts of each case. That maxim came, no doubt, indirectly under review in *Salt* v. *Marquess of Northampton*. (1) But, after reading the report of that case again, I venture to say that the only ranch of the maxim which really came under discussion there was the first, namely, was the transaction "once a mortgage"? The majority of the learned Lords (Lord Hannen dissenting) came to the conclusion that as regarded the policy of insurance it was ab initio, and therefore "once" a mortgage. The maxim that if once a mortgage it was always a mortgage was taken for granted by every one. Therefore, I regard *Salt* v. *Marquess of Northampton* (1) as a clear recognition and an undoubted enforcement of that maxim.

(1) [1892] A. C. 1.

There is another way of expressing the same principle, namely, that you must not "clog the equity of redemption." The maxim requires expansion and is not always easy of application, but at any rate I think it means that there must be in substance a redemption of the property which was mortgaged. The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force.

Now, if those maxims are still in force to their full extent—and I do not doubt that they are—it would be idle to talk about not clogging the equity of redemption when a house is to be taken back as a tied house which was mortgaged as a free house. The equity of redemption is clogged to an extent which it would be almost impossible to exaggerate in the case of a public-house in London. The difference in value between a tied house and a free house approaches very nearly to the whole value of the property. If a man cannot borrow money from a brewer upon the house upon the terms that it shall be a "tied" house during the existence of the security, there is very little he can do, and the property becomes almost valueless. If, therefore, we can treat the house as a free house before the mortgage, it must come back to the mortgagor on redemption as a free and not as a "tied" house.

It was, however, argued upon the facts that it was a tied house ab initio. I do not think that argument can be maintained. No doubt there was a tie upon the whole term in the hands of the preceding tenant. But, if our judgment in this case is correct, though the tie existed as a matter of verbal bargain, it was illegal, and might have been set aside. Supposing that the plaintiff had bargained, as he might have done, with the former tenant, that he should transfer the mortgaged property, I do not see how, consistently with our judgment, it can be doubted that he would have been able to get rid of the covenant tying the property during the term, just as he seeks now to do, and I do not think the fact that the

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transaction was carried out somewhat differently as a matter of conveyancing can make any difference in favour of the mortgagees, the brewers, though in some aspects it might be more disadvantageous. Therefore, in my opinion, the property must be treated as having been free at the date of the mortgage to the defendants, and it has, by the terms of the mortgage, been rendered a "tied" house, possibly for many years after the mortgage has come to an end. Therefore, we cannot affirm the validity of the tie for all that period without doing violence to the two maxims to which I have referred.

It was said (and I do not quarrel with the statement) that, unless there is something unconscionable in it, a collateral bargain is perfectly legal. I was much struck with the argument of Mr. Beaumont on that point. This was deliberately made a mortgage payable on demand—not, I should think, an unusual form of mortgage with brewers. I do not mean to suggest that the defendants would have done such a shabby thing as to turn the plaintiff out and use their money to get a similar tie upon another house, but I think that would have been quite within their power, and within what they bargained for. And if we had had to decide whether this is an unconscionable collateral advantage, though I do not think it is necessary to decide that point, I am not sure that we should have decided it in favour of the brewers.

COLLINS L.J. I am of the same opinion. I think the question is comparatively simple when the facts are understood. Nothing, so far as I can see, has been said in any of the authorities which have dealt with collateral bargains between mortgagor and mortgagee to alter the rule thus compendiously stated by Cozens-Hardy J. (1): "'Once a mortgage, always a mortgage,' is still a sound legal maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety. No part of it can be retained by the mortgagee." This principle is quite unaffected by cases in which the point was, what was the subject-matter

(1) [1900] 1 Ch. 218.

of the mortgage security. For instance, in the last and most important case, *Santley* v. *Wilde* (1), the real decision was that the share of the profits likely to accrue or capable of accruing from the theatre during the whole term of the lease was secured by the mortgage equally with the sum of 2000*l.* advanced to the mortgagor. That was the ground upon which Lindley M.R. distinctly rested his judgment. After reading the terms of the mortgage deed, he said (2): "That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the 2000*l.* and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given." The share of those rents being part of the subject of the security, the covenant to pay it during the whole term was not a "clog" upon that equity of redemption which could not come into existence until that share, as well as the 2000*l.*, had been paid. It is true, that incidentally the effect of that particular case was, in the circumstances, that there could never be any right of redemption, but that only arose just as it might arise from a stipulation limiting a time within which redemption could not be demanded. There was not a "clog" on the equity of redemption, because that equity could only be exercised upon payment of what was charged on the security. It was a mere collateral incident, so to say, that the amount for which the property was to stand as security could not be ascertained until the happening of an event contemporaneous with the expiration of the mortgagor's interest in the property. That does not in the slightest degree affect the point we have now to decide, namely, whether there was anything in the agreement between these parties which, on payment of all money secured by the mortgage, would debar the mortgagor from getting back the whole subject-matter of the security. The decisions as to collateral contracts which were considered both in *Santley* v. *Wilde* (1) and in *Biggs* v. *Hoddinott* (3) are, as it seems to me,

(1) [1899] 2 Ch. 474. (2) [1899] 2 Ch. 476. (3) [1898] 2 Ch. 307.

C. A. 1900 RICE v. NOAKES & Co. Collins L.J.

not very relevant to the present case, and they do not impugn in the slightest degree the principle stated by Cozens-Hardy J. I think, therefore, that in this case one question is, What was secured by the mortgage? For what did the mortgage stand as security? Then you have to ascertain what was granted as security. What, then, was granted? When you look at the mortgage deed it seems to me that that which was granted was an unincumbered term—the term, less one day, of which the mortgagor was possessed. It was granted as security for an advance of money. It follows that when the money is repaid that which stood as security for it must be handed over to the mortgagor unimpaired. Now, in the mortgage deed there is a covenant which imposes a "tie" upon the house—not a personal restriction on the mortgagor. The result is that this covenant introduced puts it out of the power of the mortgagee to give back to the mortgagor on redemption that which he was bound to return to him, namely, the unincumbered term. He can only give back a term which would in the hands of every one to whom it might come during its existence be bound by the obligation imposed by this covenant. Therefore the case is reduced to this: Was the thing granted as a security a term with a "tie" or a term without a "tie"? Mr. Haldane contended that the only thing granted was the term with the "tie"—that though by the words of the deed the unincumbered term is without any qualification made the security, yet, because you find in the same deed a covenant which is intended to be a "clog" on the term, you must assume that the contract of mortgage comes after and is independent of and collateral to the covenant; so that the thing mortgaged is not the term without the covenant, but the term with the covenant. It seems to me impossible to isolate the covenant from the transaction of mortgage. It is one and the same transaction, and the thing mortgaged is that which the deed purports to mortgage as an unincumbered term, with the superadded covenant which has the effect (whether it was contemplated or not) of making it impossible to comply with the rule laid down by Cozens-Hardy J.—that no part of that which is the mortgage security can, when the obligation

is discharged, be retained by the mortgagee, but it must be returned to the mortgagor in its entirety. I treat the rule laid down by Cozens-Hardy J. as one by which we are bound. So far as I can see, there is nothing in any of the other cases which has in the slightest degree impugned it, and it was the basis of the decision of the House of Lords in *Salt* v. *Marquess of Northampton*. (1) Whether such a rule ought ever to have been adopted is a matter upon which I am not competent to pronounce an opinion. I take the rule as it is, and I am bound to apply it to this case, unless I can arrive at the conclusion that that which was mortgaged was the term with the "tie," and not the term without the "tie."

Mr. Haldane suggested that we should look behind the mortgage deed itself at the whole transaction from its inception, when the publican was holding a term which was mortgaged and "tied." If the mortgage had purported to be of the tenant's interest as it then stood, if the parties had intended to mortgage that interest and nothing else, I am not sure that Mr. Haldane's argument might not have been sound, and that the mortgagees would not have been bound to return to the mortgagor more than as between them it was intended they should return. But I do not think that question really arises, for at the inception of the transaction between these two parties the term was untied and free, and it is this free and untied term which was made subject to a "tie."

For these reasons I think the appeal should be dismissed.

Solicitors: *Fishers; Sandilands & Co.*

(1) [1892] A. C. 1.

W. L. C.

C. A.
1900
June 27, 28.

DAVIES *v.* THOMAS.

[1899 D. 18.]

Vendor and Purchaser—Unpaid Purchase-money—Vendor's Lien—Personalty—Share of Proceeds of Sale—Lunacy—Lunatic not so found—Appointment of Receiver—Rights of Third Parties—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

A vendor of personal estate is entitled to a lien for unpaid purchase-money on the property sold, e.g., when that property is a share of the proceeds of sale of leasehold property held by the trustees of a will upon trust for sale and division of the proceeds among specified persons.

An order in Lunacy, under s. 116 of the Lunacy Act, 1890, authorizing a person therein specified in the name and on the behalf of the lunatic to receive and give a discharge for all sums of money due to him, does not affect rights enforceable against the lunatic's property at law or in equity (such as a vendor's lien for unpaid purchase-money), previously acquired by third persons.

Such an order deals only with the lunatic's equitable interest in his property.

In re Winkle, [1894] 2 Ch. 519, explained and distinguished.

Appeal against the judgment of Bruce J. at the trial of the action declaring that the plaintiff was entitled to a lien for unpaid purchase-money upon a sum of 570*l.* 9*s.* 8*d.* in the hands of Thomas Thomas and William Morgan, two of the defendants, as trustees of the will of William Edmunds, deceased, who died on October 25, 1859. By his will, dated March 28, 1859, he bequeathed some leasehold houses to trustees, upon trust to permit his wife, his daughter, and his son-in-law successively to receive the rents and profits thereof for their respective lives, and after the death of the last surviving tenant for life upon trust, at such times and in such manner as the trustees might think expedient, to sell the houses and to hold the net proceeds of sale upon trust for certain persons named in the will. Under this trust Edward Lewis became entitled to a share of the proceeds of sale in remainder subject to the tenancies for life.

The last survivor of the tenants for life died in April, 1894.

By a deed dated September 27, 1890, Edward Lewis assigned

all his share under the will of William Edmunds to William Smith, by way of mortgage to secure the payment of 200*l.* with interest thereon.

By a deed dated October 24, 1891, Edward Lewis charged his share under the will of William Edmunds with the payment to William Smith of the further sum of 50*l.* with interest.

On April 5, 1892, William Smith transferred the mortgage of September 27, 1890; and on May 12, 1892, he transferred the further charge of October 24, 1891, to the plaintiff W. H. Davies.

On January 27, 1894, the plaintiff in exercise of his statutory power of sale under the Conveyancing Act, 1881, put up the mortgaged share for sale by auction, and at the sale the defendant David Lewis was declared the purchaser for the sum of 500*l.*

By a deed dated August 15, 1894, the plaintiff, in exercise of his power of sale, assigned to David Lewis absolutely the premises described in and expressed to be conveyed and assigned by the mortgage of September 27, 1890. The assignment was expressed to be made in consideration of 500*l.* paid to the vendor by the purchaser on or before the execution of the deed.

David Lewis was the solicitor of the plaintiff, and there had been various monetary transactions between them. The amount due to the plaintiff upon his mortgages was 294*l.* 18*s.* 11*d.*, and it was admitted that David Lewis paid or accounted to the plaintiff for that sum. But the balance of 205*l.* 1*s.* 1*d.*, which ought to have been paid to the representatives of the mortgagor, was never paid by David Lewis, but was misappropriated by him, and the plaintiff was compelled to pay the 205*l.* 1*s.* 1*d.* out of his own pocket to the mortgagor's representatives.

In 1895, after the death of the last surviving tenant for life under the will of William Edmunds, his trustees sold the leasehold houses, and there was in their hands the sum of 570*l.* 9*s.* 8*d.*, which represented the share of Edward Lewis under the will.

David Lewis was also the solicitor for the trustees of the will.

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On February 21, 1898, David Lewis became of unsound mind, but he was not so found by inquisition.

On May 13, 1898, on the ex parte application of his wife, an order was made by a Master in Lunacy, under s. 116 of the Lunacy Act, 1890, authorizing the wife (inter alia) in the name and on the behalf of the lunatic to sell his real and personal estate, and in the meantime to let and manage his freehold and leasehold property, and to receive and give a discharge for the rents and profits thereof, and thereout to pay all proper outgoings, and for getting in and making available any outstanding estate of the lunatic, the wife was authorized in his name and on his behalf to receive and give a discharge for all sums of money due to him. And it was ordered that so much as should be expended, not exceeding 200*l.*, be allowed for the maintenance of the lunatic from February 21, 1898.

On July 29, 1899, another order was made by the master authorizing the lunatic's wife in his name and on his behalf to demand and receive from the trustees of the will of William Edmunds the above-mentioned sum of 570*l.* 9*s.* 8*d.* in their hands.

This action was commenced on January 4, 1899, against the trustees of the will of William Edmunds and David Lewis, by his wife as his guardian, claiming a declaration that the plaintiff was entitled to a lien on the sum of 570*l.* 9*s.* 8*d.* in the hands of the trustees in respect of 205*l.* 1*s.* 1*d.*, the balance of the purchase-money unpaid by David Lewis.

Bruce J. held that the plaintiff was entitled to the lien which he claimed.

An appeal was presented on behalf of the lunatic, David Lewis.

R. Rowlands, for the appellant. In such a case as this there is no vendor's lien for unpaid purchase-money, and, if there ever was such a lien, it cannot now prevail against the orders in Lunacy which have placed the lunatic's property under the jurisdiction of the Court in Lunacy. The Court will administer the property for the benefit of the lunatic without regard to the claims of other persons.

The nature of a vendor's lien is shewn by *Mackreth* v. *Symmons*. (1) Such a lien does not extend to money. In *Collins* v. *Collins* (2) it was assumed, not decided, that an unpaid vendor of a debt proved in an administration suit was entitled to a lien on a fund in court which was applicable to the payment of the debt. The only question decided was that the vendor had not lost his lien. And in *In re Albert Life Assurance Co.* (3) the question was whether there was any intention that a lien should exist.

As to the effect of the orders in Lunacy, in *In re Winkle* (4) it was held that a judgment creditor, who had delivered a writ of fi. fa. to the sheriff before a receiving order in Lunacy had been made against the judgment debtor, must be postponed to the maintenance of the lunatic. Indeed, in that case the sheriff had taken possession before the appointment of the receiver in Lunacy, and had withdrawn in pursuance of an order of a judge in chambers made after the appointment of the receiver. Except in bankruptcy, a creditor who has delivered a writ to the sheriff is a secured creditor, and is in as good a position as if he had actually taken possession: *Ex parte Williams* (5); *Woodland* v. *Fuller*. (6) An equitable lien stands in no better position than that which is acquired by the delivery of a writ to the sheriff. Till actual possession has been taken, the title of the receiver must prevail. The authority of *In re Winkle* (4) has not been shaken by *In re Clarke*. (7) A receiver appointed by the Court is deemed to be in possession as soon as the order directing him to take possession is made, and when he is in possession he cannot be displaced even by a secured creditor. Any interference with his possession is a contempt of Court: *Ames* v. *Birkenhead Docks Trustees*. (8) This case was not cited in *In re Clarke*. (7) An assignee of a chose in action has no specific lien on the property as against the assignee in bankruptcy of the assignor if he is allowed to continue in possession: *Ryall* v. *Rowles*. (9) After an assignment of a share in a trust

(1) (1808) 15 Ves. 329; 10 R. R. 85.
(2) (1862) 31 Beav. 346.
(3) (1870) L. R. 11 Eq. 164.
(4) [1894] 2 Ch. 519.
(5) (1872) L. R. 7 Ch. 314.
(6) (1840) 11 Ad. & E. 859.
(7) [1898] 1 Ch. 336.
(8) (1855) 20 Beav. 332.
(9) (1749–50) 1 Ves. Sen. 348.

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fund, the trustee is in equity a trustee for the assignee. But this is not like a possessory lien; the assignee can only enforce his right by applying to the Court. An equitable lien is not in equity equivalent to possession.

[LORD ALVERSTONE M.R. referred to *Levy* v. *Stogdon*. (1)]

The question there was as to a purchaser's lien for the deposit which he had paid, he not being able to enforce specific performance of his contract.

Whether there shall be a lien for unpaid purchase-money or not is a question of intention, and the circumstances of the present case shew that the vendor did not intend to rely upon a lien. The plaintiff, who sold the mortgaged property under his power of sale, ought to have paid the balance of the proceeds of sale, after satisfying what was due to himself, to the mortgagor at once, and he could not have looked to a fund, which might not come into the hands of the trustees of the will for years afterwards, as security for the payment of the purchase-money of that which he sold.

Brynmor Jones, Q.C., for the trustees of the will.

Upjohn, Q.C., and *Bailhache*, for the plaintiff. The plaintiff is entitled to the lien which he claims. The lien arose when the contract for sale was made. At that time the property was leasehold. The lien extends to a reversionary interest. It is created by a rule of equity without any special contract, and it will prevail against a third person who has notice that the purchase-money has not been paid: *Mackreth* v. *Symmons* (2); *Rice* v. *Rice*. (3) That the lien extends to personal estate, such as money, is shewn by *Collins* v. *Collins* (4); *In re Albert Life Assurance Co.* (5); *Aberaman Ironworks* v. *Wickens* (6); *Levy* v. *Stogdon*. (1)

[RIGBY L.J. Even if there is no lien, are not the trustees of the will trustees for the plaintiff? A trustee for a beneficiary becomes, if the beneficiary assigns his interest, a trustee for the assignee.]

The trustees became trustees for the plaintiff as mortgagee,

(1) [1898] 1 Ch. 478.
(2) 15 Ves. 349, 350; 10 R. R. 85.
(3) (1853) 2 Drew. 73.
(4) 31 Beav. 346.
(5) L. R. 11 Eq. 164, 178.
(6) (1868) L. R. 4 Ch. 101.

and they remain trustees for him until he has been paid in full the proceeds of the sale of the mortgaged property.

The orders in Lunacy, which were made ex parte, cannot have altered the plaintiff's rights. Those orders only affect the lunatic's equitable interest in his property, that is, subject to any security upon it; they do not affect the plaintiff's rights: *In re Clarke* (1); *In re Leavesley* (2); *In re David Lloyd & Co.* (3) In *In re Winkle* (4) the decision turned upon the fact that the sheriff had gone out of possession. And, moreover, the attention of the Court was not directed to s. 15 of the Statute of Frauds (29 Car. 2, c. 3), or to s. 26 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which is now substituted for it: *Ex parte Williams.* (5) The delivery of a writ to the sheriff binds the goods of the debtor, but does not create a security. When a judgment creditor of a lunatic has obtained a charging order on funds of the lunatic in the High Court, the charge has precedence over the maintenance of the lunatic: *In re Brown.* (6) Sect. 116 of the Lunacy Act, 1890, only gives the Court a statutory power to appoint (without inquisition) some person to do that which a committee after inquisition could have done. The person so appointed can only do what the lunatic himself could have done, had he been sane. The rights of third persons are not affected. A person, who without the leave of the Court interfered with the possession of a receiver appointed by it, would be liable to be committed, but leave would be given almost as a matter of course to a creditor to enforce his legal or equitable rights against the lunatic's property: *Lane* v. *Capsey.* (7)

[RIGBY L.J. referred to *In re Henry Pound, Son & Hutchins.* (8)]

R. Rowlands, in reply.

LORD ALVERSTONE M.R., after stating the facts as above, continued:—Two important questions arise: (1.) Whether the plaintiff is entitled to a vendor's lien upon so much of the

(1) [1898] 1 Ch. 336, 341, 342.
(2) [1891] 2 Ch. 1.
(3) (1877) 6 Ch. D. 339.
(4) [1894] 2 Ch. 519.
(5) L. R. 7 Ch. 314, 318.
(6) [1900] 1 Ch. 489.
(7) [1891] 3 Ch. 411.
(8) (1889) 42 Ch. D. 402.

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money in the hands of the trustees as represents the share of which the defendant David Lewis became the purchaser. (2.) Whether the orders made in Lunacy prevent the rights of the plaintiff from now being effectually enforced against the money. In my opinion the plaintiff is in the position of an unpaid vendor, and is entitled in respect of his unpaid purchase-money to a lien upon the property which he sold, unless something has happened to debar him from asserting it. At the time of the sale by the plaintiff and at the time of the conveyance to David Lewis the property was still leasehold property, though the last tenant for life was then dead, and the duty of the trustees to convert the property into money had arisen. But, even if the thing sold had been simply a claim to receive a share of the money arising from the realization of the leaseholds, I think the unpaid vendor would have been entitled to a lien upon the share which he sold. In my opinion *Collins* v. *Collins* (1) and *In re Albert Life Assurance Co.* (2) shew that the principle entitling a vendor to a lien for unpaid purchase-money has been applied to other property besides land. *Collins* v. *Collins* (1) is a direct authority for that proposition. I think, therefore, that the principle on which a vendor's lien is based applies, and that the plaintiff was entitled to a lien on the property which he sold in the hands of the trustees. He has been treated throughout as the vendor of the whole of the mortgaged property which he sold under his statutory power, and he was entitled to receive the 500*l.* purchase-money. Do the subsequent transactions prevent him from now enforcing this lien? We have not, I think, sufficient information to enable us to come to that conclusion, and on the materials before us I think it would be going too far to say that the plaintiff agreed to look to the defendant D. Lewis solely as his debtor. In my opinion, therefore, the plaintiff was entitled to a lien, and is now entitled to enforce it, unless the orders in Lunacy have deprived him of it.

It has been argued that the orders in Lunacy made under s. 116 of the Lunacy Act, 1890, whereby the lunatic's wife was authorized in his name and on his behalf to receive all moneys

(1) 31 Beav. 346. (2) L. R. 11 Eq. 164, 178.

due to him, and to receive from the trustees of the will this particular fund, have discharged the fund from the lien, or prevent the lien being enforced. If this is so, it must be by virtue of the provisions either of the statute or of the orders themselves. I think the effect of such an order under s. 116 is to enable the person thereby appointed to get in the lunatic's property and nothing else, and that, if other persons have acquired rights against his property, it is not intended that the order should affect those rights. The order is made ex parte, and it authorizes the person appointed by it to do in the name and on behalf of the lunatic that which he himself could have done if he had been sane. If that is the true construction of the order, it is impossible to say that it was intended to affect the rights of third parties. We have been pressed with the decision of this Court in *In re Winkle* (1), which, it is said, shews that the fact that the property of a lunatic has become subject to the control of the Court by the appointment of a receiver prevents any charge on the property from being effectual. In my opinion the Court did not intend in that case to decide anything of the kind, as appears clearly from the later case of *In re Clarke*. (2) In *In re Winkle* (1) the Court held that in their view of the facts there was no effective charge entitling the judgment creditor to the possession of the goods, or to a lien upon them, at the time when the lunatic's wife took possession of them under the order of the Court. In *In re Clarke* (2) Lindley M.R. said (3): "Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession of the goods. This circumstance distinguishes this case from *In re Winkle* (1), where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a judge at chambers. The judgment of the Court proceeded entirely on this ground, and *In re Winkle* (1) is no authority for saying that the Court in Lunacy can deprive execution creditors of their rights over property not under the control of the Court when seized under legal process." When it is argued that *In re Winkle* (1) is a

(1) [1894] 2 Ch. 519. (2) [1898] 1 Ch. 336.
(3) [1898] 1 Ch. 339.

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decision that, though a third person has acquired valid rights against the property of a lunatic, the effect of such an order in Lunacy is to deprive him of those rights, I should require much stronger authority to establish that proposition. And, indeed, the cases referred to by Lindley M.R. shew that such an order is only intended to authorize the receiver to take possession of the lunatic's property, and not to interfere with the rights of third persons.

It was also urged that a receiver appointed by an order in Lunacy stands in the same position as a receiver appointed by the Court of Chancery, and that it would be a contempt of Court for the plaintiff to pursue his claim, and *Ames* v. *Birkenhead Docks Trustees* (1) was cited as shewing that any interference with such a receiver without the leave of the Court would not be permitted. There the Court, at the suit of a mortgagee, had appointed a receiver of the rates and tolls and of the rents of the property of the defendants, and it was held that a judgment creditor of the defendants was not entitled, without the leave of the Court, to interfere with the receiver's collection of those tolls, and that such interference would be a contempt of Court, even though the order appointing him might be erroneous. In my opinion that decision has no application to an order appointing a receiver to get in the property of a lunatic. I think neither of the two orders in Lunacy has any operation to deprive the plaintiff of any rights which he possessed, and the judgment of Bruce J. was right. The plaintiff is entitled to a lien upon the money in the hands of the trustees, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. It appears to me unnecessary to go carefully into the question of a vendor's lien. There is another way of stating the case which seems to me clear, though the principle may be the same. The trustees of the will at the time of the mortgage held the property on trust to pay the income to certain persons for life, and after their deaths on trust to sell the property and divide the proceeds of sale among specified persons, of whom the mortgagor was one.

(1) 20 Beav. 332.

At the time of the sale of the mortgagor's interest to David Lewis the trustees held the property in the condition of leasehold, and subsequently to the assignment to the purchaser they converted the leaseholds into money, and they then held the money on trust for the persons entitled to it. What was the position of the trustees? David Lewis, the purchaser, was throughout the solicitor who acted for the trustees as well as the solicitor for the plaintiff, who was the vendor. Observations have been made as to the propriety of his becoming the purchaser from his own client, but I think it is unnecessary to go into this matter. It would, in my opinion, be impossible for the trustees to say that they had not in equity constructive notice of the purchase by their solicitor of the mortgaged property, and of the fact that he had not paid the whole of the purchase-money. It was their duty to administer the trust fund produced by the sale of the leasehold property—a fund which was in their hands subject to the trusts of the will. Could they in favour of their solicitor ignore the rights of the vendor and say that they were not concerned with him, but were concerned only with their own solicitor who had purchased the mortgaged share from him? If a Court of Equity had been administering the fund, it would have inquired into the facts, and, finding that the purchaser had not paid the purchase-money, it would have held that it was its first duty to see that the mortgagee, and through him the mortgagor, had been satisfied before handing over the purchased share to the purchaser. The Court would have had no difficulty in doing that. And, in my opinion, the trustees are bound to do that which the Court would have done had it been administering the fund. That is not carrying the equitable doctrine very far. They would be bound to inquire whether the purchase-money had been paid, and to see that the claims of the mortgagee and the mortgagor were satisfied. In my opinion, therefore, even if a vendor's lien had never been spoken of, the result would have been the same in the present case.

As regards the other point, I am satisfied that this Court never intended to lay down an Alsatian rule that if the Court of Lunacy once gets hold of the property of a lunatic it will

C. A. 1900 DAVIES v. THOMAS. Rigby L.J.

ignore the rights of third persons, and treat the lunatic as solely entitled to it. It is, no doubt, remarkable that the Court does to a certain extent ignore the rights of the creditors of a lunatic, and holds that it is bound to provide for the maintenance of the lunatic in preference to the claims of his creditors. This has been the practice of the Court for centuries, and we cannot now avoid giving effect to it. But I have always understood that any rights against the property of a lunatic which are of such a nature that effect can be given to them at law or in equity will be respected by the Court, and that it is only when such rights are shewn not to exist that the Court will deal with the lunatic's property for his own benefit in the way which I have mentioned. I am satisfied that the Court did not intend in *In re Winkle* (1) to lay down anything to the contrary.

COLLINS L.J. I am of the same opinion. There is in the hands of the trustees of a will a fund which represents the money value of leasehold property which they have sold in pursuance of the directions of the will. An interest in the property is the subject-matter of the sale to the purchaser from the mortgagee. The purchaser has not paid all his purchase-money. It appears to me that the plaintiff stands in as good a position as regards the fund as he would have stood in regard to the leasehold property if it had not been sold. I agree with the Master of the Rolls that the plaintiff has done nothing which can deprive him of his lien for unpaid purchase-money. The fund is in the hands of the trustees, who had full notice of all rights affecting it, and they hold the money subject to those rights, including the unpaid vendor's lien.

As regards the orders in Lunacy, independently of any authority, it seems to me obvious on the face of the orders that they entitle the wife only to get in the equitable interest of the lunatic in his property—that is, in this case, the money representing the share which he purchased, subject to the vendor's lien. The orders do not affect the rights of third persons. But it is said that *In re Winkle* (1) is an authority

(1) [1894] 2 Ch. 519.

to the contrary, and that the right of an unpaid vendor is analogous to that of a judgment creditor who has only lodged a writ of fi. fa. in the hands of the sheriff. *In re Winkle* (1) was a remarkable case, and I think the decision turned upon the special facts. Physical possession of the lunatic's property had been taken by the sheriff, and the creditor had thereby become a secured creditor. On the same day the lunatic's wife was appointed interim receiver of his property, and the sheriff was ordered by a judge in chambers to withdraw, and he did so; and thereupon the interim receiver took physical possession of the property. In that state of facts the Court held that, the receiver being in actual possession, they must consider the claim of the lunatic to be maintained out of his property before the right of the execution creditor, who, as matters stood, was only in the position of having delivered his writ to the sheriff. In my opinion that case is clearly distinguishable from the present case. I do not think that the position of a vendor who has a lien for unpaid purchase-money is analogous to that of a judgment creditor who has merely delivered his writ to the sheriff: see *Ex parte Williams.* (2) I think the right of such a creditor, whatever it may be, falls short of actual or constructive possession of the goods of the debtor. Moreover, rightly or wrongly, the decision of *In re Winkle* (1) was based on the physical possession of the receiver, the sheriff having relinquished the possession which he had taken. There are authorities both before and since *In re Winkle* (1) which shew that a receiver appointed by the Court of Lunacy is only authorized to take possession of the lunatic's equitable interest in his property. Therefore that case does not prevent our holding that the orders made in the present case were intended to affect the interest of the lunatic himself, and nothing more. In my opinion the judgment of Bruce J. was right.

Solicitors: *Wrentmore & Son, for Spickett & Sons, Pontypridd; Metcalfe & Sharpe, for T. S. Edwards, Newport, Mon.; W. R. Davies, Pontypridd.*

(1) [1894] 2 Ch. 519.

(2) L. R. 7 Ch. 314.

W. L. C.

STIRLING J.

1900

June 12, 13, 30.

In re MORGAN. SMITH *v.* MAY.

[1899 M. 1335.]

Real Estate—Conversion—Partition Action—Sale—Distribution—Payment to Trustees having Power of Sale—"Persons absolutely entitled"—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act*, 1856 (19 & 20 *Vict. c.* 120), *s.* 23.

Real estate was sold in a partition action, and under an order, made in 1877, a share of the proceeds of sale was paid to the trustees of the will of a testator who had died possessed of the share. The will gave the trustees a power of sale exercisable with consent of the tenant for life, but did not authorize them to invest in the purchase of lands. One of the beneficiaries under the will died intestate :—

Held, that his share devolved on his legal personal representative and not on his heir.

In re Hobson's Trusts, (1878) 7 Ch. D. 708, has not been overruled by *In re Smith*, (1888) 40 Ch. D. 386.

Adjourned Summons.

Charles Henry Morgan by his will, dated September 30, 1864, gave his residuary real and personal estate to John Jones and John Davies Weston upon trust to pay the rents, interest, dividends, and annual income thereof to his wife for life, and after her death to pay the rents, dividends, and annual income to Henry Charles Croft for life, and after the decease of the survivor to stand seised and possessed of and interested in the residuary real and personal estate upon trust for his two nephews John Price Morgan and William Morgan and his two nieces Charlotte Morgan and Sophia Allen, in equal shares and proportions, and for their respective heirs, executors, administrators, and assigns absolutely. He empowered the trustees during the lifetime of his wife with her consent in writing to sell any part of his estate; and directed that they should stand possessed of the moneys to arise from any such sale upon the like trusts as were therein expressed in regard to his general trust property, and as though such moneys had originally formed part of his estate. The will contained no provision authorizing the trustees to invest in the purchase of land.

The testator died on September 30, 1864, entitled to an undivided sixth share of an estate known as the Croft estate.

In January, 1875, an action was brought for the partition of this estate; and among the defendants were the trustees of the testator's will. On March 6, 1875, the usual judgment was given in the action directing inquiries with a view to partition or sale of the estate. On March 20, 1876, an order was made giving leave to Matilda Morgan, the testator's widow, to attend the proceedings in the action, which she thenceforth did. No other beneficiary under the will was a party to the action, or was served with notice of or attended the proceedings.

By the chief clerk's certificate, dated May 16, 1876, it was found that the defendants, the trustees of the will of Charles Henry Morgan, were entitled to one-sixth of the estate, and it was stated as follows: "The last-named defendants have a power of sale with the consent of Matilda Morgan, the widow of the said Charles Henry Morgan and tenant for life under his will. The said Matilda Morgan has attended the proceedings in this cause pursuant to the order dated the 20th March, 1876." It was further certified as follows: "All the persons interested in the said lands and hereditaments as aforesaid are parties to this cause or have attended the proceedings therein pursuant to order, and severally request a sale and a distribution of the proceeds instead of a division of the said lands and hereditaments."

On May 29, 1876, an order was made for the sale of the Croft estate, and it was sold accordingly.

On April 20, 1877, an order was made for the distribution of a portion of the proceeds of sale; and it was thereby ordered that one-sixth thereof should be paid to the "defendants John Jones and John Davies Weston as the trustees of the will of Charles Henry Morgan deceased." The legal estate was outstanding in mortgagees, and the trustees of Charles Henry Morgan's will did not join in the conveyance to the purchasers of the Croft estate. A further order to the like effect was made on June 1, 1878.

In pursuance of these orders the trustees of the testator's

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will received sums amounting to 2858*l.* 10*s.* 4*d.*, which they invested in accordance with the trusts of the testator's will.

The testator's widow died on October 10, 1897.

John Price Morgan, one of the beneficiaries named in the will, having died intestate on December 7, 1885, this summons was taken out by the trustees of C. H. Morgan's will for the determination of the question whether the share of John Price Morgan devolved upon his heir-at-law or his legal personal representative.

Inskip, for the trustees.

Christopher James, for the defendant, the legal personal representative. The order of April 20, 1877, for payment of the proceeds of sale to the trustees as trustees of the will, effected a conversion. The Court has treated the trustees as persons "becoming absolutely entitled": Partition Act, 1868, s. 8; Leases and Sales of Settled Estates Act, 1856, s. 23. There have been numerous decisions on the 69th section of the Lands Clauses Consolidation Act, 1845, which is almost identical in terms with s. 23 of the Act of 1856: *In re Hobson's Trusts* (1); *In re Thomas's Settlement* (2); *In re Evans' Settlement* (3); *In re Ward's Estates* (4); *In re London, Brighton and South Coast Ry. Co.* (5) It has been suggested, however, in *In re Smith* (6), that the Court has a discretion, and will not necessarily pay to trustees. That is the strongest case against the defendant's contention, but it is not insuperable even if payment out were now being asked for. The money was paid out to the trustees as trustees of the will, and came to their hands to be held upon the trusts declared by the will which do not authorize a reinvestment in land.

A. Adams, for the heir-at-law. The proceeds of sale must be treated as realty. There is an equity for reconversion in favour of the heir: *Foster* v. *Foster* (7); *Mildmay* v. *Quicke* (8); *In re Barker*. (9) In *Kelland* v. *Fulford* (10) doubt was

(1) 7 Ch. D. 708.
(2) (1882) 30 W. R. 244.
(3) (1880) 14 Ch. D. 511.
(4) (1884) 28 Ch. D. 100.
(5) W. N. (1888) 179.
(6) 40 Ch. D. 386.
(7) (1875) 1 Ch. D. 588.
(8) (1877) 6 Ch. D. 553.
(9) (1881) 17 Ch. D. 241, 245.
(10) (1877) 6 Ch. D. 491, 495.

expressed as to whether the words "absolutely entitled" did apply to a trustee with a power of sale. There is an equity to reconvert unless there is some person "absolutely entitled." *In re Hobson's Trusts* (1) cannot be treated as a binding decision having regard to *In re Smith* (2) and *In re Barker*. (3) None of the cases cited in *In re Hobson's Trusts* (1) involved the question of conversion at all. In that case the Court, having found that the trustees were persons entitled to give a receipt, allowed them to receive the money. In *In re Smith* (2) trustees with a power of sale were held not to be "absolutely entitled." In such a case the Court would now probably refuse to order payment out. It has never been decided that the effect of payment out to trustees is to work a conversion, and the Court is not bound so to decide. It is not too late even now, if a wrong order has been made, to set it right. The money is in the hands of the trustees, and no rights of third parties have come in question: *In re Tugwell* (4); *Ex parte Flamank*. (5) The rights of the heir-at-law have not been affected by the order for payment out.

C. James, in reply. The equity upon the trustees is not to reconvert, but to apply the money under the trusts of the will. If they had reinvested in land it would have been a breach of trust. That is an answer to the whole argument. In none of the cases cited was the person interested in the share in a position to say that the money should be treated as money. The only point in *In re Barker* (3) was that the money had not been ear-marked as real estate. It cannot be said that there has been any slip here. There was a deliberate adoption by the Court of the last sub-section of s. 23. The case is concluded by the orders.

Cur. adv. vult.

June 30. STIRLING J. (after stating the facts). By s. 8 of the Partition Act, 1868, it is provided that ss. 23 to 25 (both inclusive) of the Leases and Sales of Settled Estates Act, 1856,

(1) 7 Ch. D. 708.
(2) 40 Ch. D. 386.
(3) 17 Ch. D. 241, 245.
(4) (1884) 27 Ch. D. 309.
(5) (1851) 1 Sim. (N.S.) 260.

STIRLING J. shall extend to and apply to money to be received on any sale under the authority of the Partition Act, 1868.

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By s. 23 of the Leases and Sales of Settled Estates Act, 1856, money received on any sale is to be applied as the Court shall from time to time direct to some or one of the following purposes (namely):—

"The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

"The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

"The payment to any person becoming absolutely entitled."

These purposes are expressed in terms almost identical with those of s. 69 of the Lands Clauses Consolidation Act, 1845.

It has been held that where the share of a person under disability in a fund arising from a sale under either the Partition Act, 1868, or the Lands Clauses Consolidation Act, 1845, remains in Court, it devolves as real estate: see *Foster* v. *Foster* (1); *Kelland* v. *Fulford* (2); *Mildmay* v. *Quicke* (3); *In re Barker.* (4) The reason is there stated by James L.J. in the last case (5): "We find . . . . that the money is to be laid out in the purchase of hereditaments, to be settled in the same manner as the hereditaments in respect of which it was paid: and that means it is to be limited to the same uses, which is in fact a reconversion, unless the matter is governed by the other words, 'or to a person becoming absolutely entitled.'"

If the fund which represented the testator's share of the Croft estate had remained in court instead of being paid out to trustees, I should have thought that the share of John Price Morgan under the testator's will would have devolved as real estate; but the Court has ordered the fund to be paid out to the trustees—that is, in the language of the Lord Justice, has treated the matter as governed by the words "to a person

(1) 1 Ch. D. 588.
(2) 6 Ch. D. 491.
(3) 6 Ch. D. 553.
(4) 17 Ch. D. 241.
(5) 17 Ch. D. 243.

becoming absolutely entitled." For this mode of dealing with the share there is considerable authority.

In *In re Hobson's Trusts* (1) the question arose under the Lands Clauses Consolidation Act, 1845, and was brought before the Court of Appeal upon the refusal of the Vice-Chancellor of the County Palatine to pay out funds, to which married women were entitled, to the trustees of their marriage settlements, such trustees having power to sell and give receipts. James L.J. said: "I think the trustees of these settlements are parties who have become 'absolutely entitled' within the meaning of the 69th section, and the Court will not inquire what the trusts are. My opinion is that when a share has been settled by a marriage settlement duly executed by an adult, and the trustees have a power of sale, the trustees are persons absolutely entitled to the share which has been vested in them. The same applies to the trustees and executors of the will of the deceased daughter. Therefore, as the corporation makes no objection, we will make the order asked for."

It is to be remarked that there was no opposition to the order in that case.

This decision was acted on in many subsequent cases, among which I may refer to *In re Ward's Estates* (2), where an order was made for payment to trustees who held upon trust to sell at the request in writing of the tenant for life, who joined in the petition.

However, in the case of *In re Smith* (3), in the Court of Appeal, Cotton and Bowen L.JJ. expressed serious doubts as to the correctness of the view expressed by James L.J. in *In re Hobson's Trusts* (1), while Lindley L.J. said that he was not prepared to say that the Court might not have had jurisdiction under the Lands Clauses Consolidation Act, 1845, to order payment to the trustees. All these learned judges agreed that the jurisdiction, if it existed, ought not to be exercised in that case.

I do not propose to read the judgments of the learned Lord Justices, but I desire to call attention to one remark of Cotton L.J., because it is, I find, based on a misapprehension.

(1) 7 Ch. D. 708, 710. (2) 28 Ch. D. 100. (3) 40 Ch. D. 386.

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At p. 391 of the report Cotton L.J. says: "The case came from the Palatine Court, not exactly by way of appeal, but it was mentioned to the Court of Appeal at the suggestion of the Vice-Chancellor in order to elicit the opinion of that Court whether he could properly make the order asked for, which he himself felt a difficulty in doing." No doubt that observation is based upon the report in 7 Ch. D. 710, n., where the Vice-Chancellor says: "I have no objection to the case being mentioned to the Court of Appeal, with a view to the opinion of that Court being elicited whether I can properly make the order asked for"; but I have examined the order which was made and find that there was a formal appeal, and that the order of the Vice-Chancellor was varied; so that I must treat *In re Hobson's Trusts* (1) as a decision upon the point.

These cases all arose under the Lands Clauses Consolidation Act, 1845; but the language of the Settled Estates Act of 1856 is so nearly identical that they have always been taken to be authorities for the purposes of that Act also.

In that state of the authorities, it seems to me that *In re Hobson's Trusts* (1) has not been overruled, and that a Court of first instance cannot hold that the order there made was bad. Even if it had been overruled, I should feel great difficulty in saying that the orders made in the present case, more than twenty years ago, and which were never appealed from, are not binding on all parties interested.

This being so, the only question which remains is, what is the effect of the orders made? In my judgment, the effect is that the fund in court ceased to be applicable to be laid out in land under the Settled Estates Act, 1856, and came to the hands of the trustees of the will of Charles Henry Morgan to be held upon the trusts thereby declared. These trusts do not authorize an investment in land; and, in my opinion, the sum with respect to which the question arises devolved on the legal personal representative of John Price Morgan, and not on his heir-at-law.

Solicitors: *Arber & Lewis, for Press, Inskip & Press, Bristol; S. A. Stephen.*

(1) 7 Ch. D. 708.

G. A. S.

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June 19; *July* 12.

In re DE WILTON. DE WILTON *v.* MONTEFIORE.

[1900 D. 595.]

Marriage — Validity — Capacity to Contract — Domiciled British Subjects — Jews — Prohibited Degrees of Consanguinity — Solemnization according to Jewish Rites — Lex Domicilii — Marriage Act, 1835 (5 *&* 6 *Will.* 4, *c.* 54), *s.* 2 — *Marriage Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 85), *s.* 2 — *Marriage Act*, 1840 (3 *&* 4 *Vict. c.* 72), *s.* 5.

The capacity of persons professing the Jewish religion who are also domiciled British subjects to contract marriage is regulated by the law of England.

Therefore, where a marriage was solemnized abroad according to Jewish rites between a niece and her maternal uncle, both the contracting parties being at the time of the solemnization domiciled British subjects and adherents of the Jewish faith, and the marriage being valid by the Jewish law:—

Held, that the marriage was invalid.

THIS was an originating summons taken out by the legal personal representative of the testatrix, Mrs. De Wilton, against the beneficiaries under the will to determine whether the defendant Joseph Gompertz Montefiore, as the legal personal representative of the testatrix's daughter Eugenie, was entitled in her right to a share of the residuary estate bequeathed by the will of the testatrix, and, if entitled, upon what trusts the share was to be held. This question involved the further question whether the testatrix's daughter Eugenie died leaving children or issue within the meaning of the will.

The testatrix by her will, dated July 30, 1889, gave certain stocks and securities to her trustees upon trust to divide the same into three equal shares, and declared that her trustees should stand possessed of one of such shares upon trust to pay the income thereof to her daughter Consuelo during her life, and after her death to stand possessed of such share in trust for the children or remoter issue of such daughter born or to be born during her life, or within twenty-one years after her death, as the daughter should appoint, and in default of appointment in trust for all the children of the daughter who being

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sons should attain twenty-one, or being daughters should attain that age or marry. And if there should be no child or other issue of such daughter who being a son should attain twenty-one, or being a daughter should attain that age or marry, then after the death of the daughter and default or failure of children or issue, the testatrix declared that the said share of the trust fund should accrue to the shares of any other daughter or daughters who should be living at her death in equal shares. And the testatrix further declared that the trustees should stand possessed of another of such one-third shares upon the like trusts in favour of her daughter Eugenie and her issue. After disposing of the remaining one-third share the testatrix gave her residuary estate to the trustees in trust for all her children (including any who might have died in her lifetime leaving issue living at the death of the testatrix) who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and so that the share of any child who might have died in her lifetime leaving issue as aforesaid should devolve on his or her representatives as part of his or her personal estate in the same manner as if he or she had survived the testatrix and died immediately after her. And she directed that the trustees should retain the share of each daughter in the residuary trust fund, and hold the same upon the like trusts in favour of each such daughter, her children, or issue as were thereinbefore declared of and concerning their said respective one-third share of the first-mentioned trust fund. On March 22, 1893, the testatrix's daughter Eugenie died. By a codicil dated June 12, 1893, the testatrix, after reciting that her daughter Eugenie had recently died, revoked the trusts in favour of Eugenie and her issue of and concerning the one-third share of the first-mentioned trust fund, and disposed of it otherwise, and in all other respects she confirmed her will. She afterwards made further codicils, which did not affect the present question. On January 30, 1899, the testatrix died.

The facts which gave rise to the question raised by the summons were as follows: Mrs. De Wilton was by birth a Jewess, but married a Christian in accordance with the rites of

the Church of England. Her daughter Eugenie was brought up as a Christian. In 1876 Eugenie De Wilton became engaged to be married to her maternal uncle, Joseph Gompertz Montefiore. Both were British subjects domiciled in England. Mr. Montefiore was an adherent of the Jewish faith. Miss De Wilton was desirous of being admitted to the same faith, but could not be so admitted according to the rules of the synagogue to which Mr. Montefiore belonged, nor could she be married. They therefore went to Wiesbaden, in Germany, where, on August 20, 1876, they went through the form of civil marriage, and afterwards of marriage according to the custom and practice of the Jews. At that time Miss De Wilton had not been formally admitted into the Jewish faith, but she was so admitted at Paris on September 17, 1876; and afterwards, on the same day, she there went through the form of marriage with Mr. Montefiore according to the Jewish custom and practice. The evidence shewed that such a marriage was valid according to the law in force at Wiesbaden, and also that it was valid by the Jewish law provided that at the time of the ceremony both the contracting parties were adherents of the Jewish faith. There were issue of the marriage five children, of whom four were still living. The testatrix appeared in her lifetime to have recognised them as children of her daughter.

H. S. Q. Henriques, for the plaintiff.

Dicey, Q.C., and *B. A. Cohen*, for the defendant J. G. Montefiore. 1. Both parties to this marriage being adherents of the Jewish faith, and the marriage being valid according to Jewish law, we submit that it is valid according to English law. In the face of *Brook* v. *Brook* (1) and *Reg.* v. *Chadwick* (2) it is impossible to contend that this marriage would be valid as between Christians; but we say that the Marriage Act of 1835 (5 & 6 Will. 4, c. 54) does not apply to Jewish marriages. That Act makes absolutely void all future marriages between persons within the prohibited degrees of consanguinity or affinity. Two questions arise under it. What are prohibited degrees? To whom does the Act apply? The question what

(1) (1861) 9 H. L. C. 193. (2) (1847) 11 Q. B. 173.

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are prohibited degrees depends upon 28 Hen. 8, c. 7, 28 Hen. 8, c. 16, and 32 Hen. 8, c. 38, and Canon 99, and a table of prohibited degrees is set out in Coke's 2nd Inst. p. 683. Those enactments could have no application to Jews, because at the time when they were passed there were no Jews in England. The history of the Jews in England will be found in a note to *Lindo* v. *Belisario* (1), in which case the validity of a Jewish marriage first came in question in England. There Sir William Scott considered that Jewish marriages were regulated by Jewish law, not merely as regards form, but in all respects, and that their validity was to be determined by Jewish law. It may be said that his judgment was confined to the formalities of the marriage, but his language draws no distinction between form and matter, and in a later stage of the same case the learned judge, at a time when divorce was unknown to English law, recognised what may be called the common law of Judaism as to divorce, for he held that although the marriage there in question was not valid, yet a divorce would be required before a fresh marriage could be contracted. That goes a long way towards shewing that the marriage law of the Jews was treated in England as a separate and distinct marriage law. This view is also borne out by the observations of Lord Brougham and Lord Campbell in *Reg.* v. *Millis*. (2) This marriage, therefore, would be valid if solemnized before the Marriage Act, 1835. Then what is the effect of that Act? It was aimed at preventing marriages with a deceased wife's sister, which, though voidable, were not void unless steps were taken to avoid them. We submit that it did not contemplate Jewish marriages. The tendency of the English law to treat Jewish marriages as different from the marriages of ordinary British subjects is illustrated by the Marriage Act of 1836 (6 & 7 Will. 4, c. 85), since it contains a saving clause reserving to the Jews the right to "continue to contract and solemnize" marriage according to their usages; and the same saving clause is to be found in the Marriage Act of 1840 (3 & 4 Vict. c. 72). That language applies to the

(1) (1795) 1 Hagg. Cons. 216, 217, n.

(2) (1844) 10 Cl. & F. 534, 701, 736, 738, 794.

capacity to contract as well as to the formalities of the marriage. We submit that the Marriage Act of 1835 was not intended to alter the previous law as to Jewish marriages either as regards form or as regards matter, and consequently that this marriage was valid.

2. Assuming that this marriage is bad, there is a sufficient indication in the will and codicil shewing that the testatrix meant the children of this marriage to take. The codicil expressly confirms the will, and the will must be read as if it had been re-executed at the date of the codicil. At that date Eugenie was dead, and the will would be almost unmeaning unless it referred to issue in fact. It is reasonable to suppose that the testatrix in leaving to issue intended to include issue by a marriage good according to Jewish law: see *In re Jodrell.* (1)

H. S. Q. Henriques, for the remaining defendants. Dealing first with the second point, I say that the testatrix has shewn no intention of benefiting Eugenie's issue. The object of the codicil was to exclude her issue from taking any share in the specific trust fund. In the will the gift of residue is not to Eugenie and her issue, but is a gift to the testatrix's children as a class. There is no indication in the will or codicil of an intention to benefit any but lawful issue. It is said that this question is affected by the fact that the daughter had become a Jew, but the fact of children being legitimate according to Jewish law has been held not to entitle them to take under the will of a Jew unless they are also legitimate by the law of England: *Levy* v. *Solomon.* (2)

Then is the marriage valid? It is conceded that if these persons had not been Jews they could not have married each other. The fact that the parties went through the form of civil marriage at Wiesbaden will not validate the marriage: *Brook* v. *Brook* (3); and the religious ceremony at Wiesbaden was void because the lady had not then been recognised as a proselyte to the Jewish faith. Then in Paris the religious ceremony is performed again, but no civil ceremony. There is no evidence that a Jewish marriage is valid in France without

(1) (1890) 44 Ch. D. 590. (2) (1877) 25 W. R. 842.
(3) 9 H. L. C. 193.

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the civil ceremony; nor any evidence that the civil ceremony in Germany followed by the religious ceremony in France constitutes a valid marriage. The religious ceremony could not make these parties man and wife so as to legitimise the issue. There is no recognised law of domicil for any particular creed. The question of the personal capacity to contract marriage is determined by the law of the domicil of the contracting parties whatever their creed: *Sottomayor* v. *De Barros*. (1) The Marriage Act of 1835 applies to everybody, and it is impossible to contend that Quakers or Jews can be allowed to marry within the prohibited degrees.

Except so far as Jews are expressly exempted by Act of Parliament, they are subject to all the enactments of the English law; and the Act of 1835 does not exempt Jews from its operation: see Hammick's Marriage Law of England, 2nd ed. p. 164. It is suggested that in matters appertaining to religion, e.g. marriage, the Jews are exempt from the laws of England; but there is no authority for that proposition. From 1685 the Jews may be said to have had a legal status in England; but it must not, therefore, be assumed that marriage according to Jewish rites would be recognised. Prior to Lord Hardwicke's Act (26 Geo. 2, c. 33) the Legislature regarded Jewish marriages as invalid, and the reason is that before the Marriage Acts no marriage was valid unless solemnized in the presence of a priest of some recognised Church; and, according to *Reg.* v. *Millis* (2), it appears that the only Churches recognised by the law of England are the Established Church, the Church of Rome, and the Greek Church. There might be isolated cases in which marriages had been held valid, though not solemnized in the manner above stated, but the law is laid down, as above stated, in Blackstone, p. 439; and see *Haydon* v. *Gould*. (3) There is ample authority for saying that prior to Lord Hardwicke's Act the marriages of Jews were void, and that the Court to try the question of their validity was the Ecclesiastical Court: see *La Costa* v. *Villa Real*. (4) With regard to *Reg.* v. *Millis* (2), it is to be observed that the dicta

(1) (1877) 3 P. D. 1.
(2) 10 Cl. & F. 534.
(3) (1710) 1 Salk. 119.
(4) (1733) 1 Hagg. Cons. 242, n.; 2 Str. 961.

quoted by Mr. Dicey were by two of the Lords who voted for the opinion which was overruled. The effect of that decision was to leave it doubtful whether the marriages of Jews and Quakers solemnized before the commencement of the Marriage Act of 1836 had any validity unless solemnized in the presence of a priest of a recognised Church, and an Act was passed for the express purpose of removing that doubt (10 & 11 Vict. c. 58).

But, however this may be, the exemption in favour of Jews granted by the Legislature in several Acts of Parliament—an exemption equally applicable to Jews and Quakers—affects only the forms and ceremonies attending the marriage; it does not extend to the incidents of the marriage; consequently any incident given to it by the Jewish law, but not by the English law, does not attach to it: 26 Geo. 2, c. 33; 4 Geo. 4, c. 76, s. 31; 6 & 7 Will. 4, c. 85, s. 2; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, ss. 21 and 22; 61 & 62 Vict. c. 58, s. 13; and see *Brook* v. *Brook*. (1)

If the cases before Lord Stowell are narrowly scrutinized, it will be found that that was also the view of that learned judge. In *Lindo* v. *Belisario* (2) the question was one of form, and, having regard to Lord Hardwicke's Act, he felt himself bound to have recourse to the Jewish authorities: so also in *Goldsmid* v. *Bromer*. (3) On the other hand, there are cases in which it is expressly laid down that the incidents of a Jewish marriage, if inconsistent with the incidents attaching to marriage by the English law, will not be upheld: *D'Aguilar* v. *D'Aguilar* (4); and see *Levy* v. *Solomon*. (5) This marriage is, therefore, invalid.

Dicey, Q.C., in reply.

Cur. adv. vult.

July 19. STIRLING *J.* (after stating the facts as above set out). The question which I have to determine is whether the testatrix's daughter Eugenie left children or issue within the meaning of the will of the testatrix. Two contentions are raised on behalf of the children—(1.) that the marriage was valid: if so, they are children of the testatrix's daughter according to the strictest construction of the word; and

(1) 9 H. L. C. 193, 215.
(2) 1 Hagg. Cons. 216, 217, n.
(3) (1798) 1 Hagg. Cons. 324.
(4) (1794) 1 Hagg. Ecc. 773, 785.
(5) 25 W. R. 842.

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(2.) that even if the marriage be invalid the language of the will is such as to include them under the designation "children" as used in the will of the testatrix.

It will be convenient to consider the second point first. It is based on the doctrine laid down by Lord Cairns in *Hill* v. *Crook* (1) and by the Court of Appeal in *In re Jodrell* (2)—namely, that the will is to be taken as a dictionary to find the meaning of the terms used by the testatrix. If, for example, the testatrix had referred to her daughter Eugenie as the wife of Mr. Montefiore, I should have had no difficulty in holding that the children of Eugenie must include those who had sprung from the union referred to. Unfortunately, nothing of the kind is found in the testamentary dispositions of the testatrix. What were relied on were the expressions found in the codicil, and particularly the confirmation of the will found in it. If in the will or codicil I had found anything which shewed an indication that the testatrix regarded her daughter Eugenie as having left children or issue her surviving, I should willingly have applied the rule to which I have referred; but after careful examination of those instruments I have failed to find anything which satisfies me that the testatrix used the words "issue" or "children" otherwise than in their proper legal meaning, and I regret (so far as I can properly express such a sentiment) that I am unable to decide on that ground in favour of the children.

I have then to consider the first point—namely, the validity of the marriage. It was not disputed that the marriage of an uncle and niece, being British subjects domiciled in England, was void under the statute 5 & 6 Will. 4, c. 54. This depends on the enactments contained in 32 Hen. 8, c. 38, as judicially interpreted, the leading authorities being Coke's 2nd Inst., p. 683, *Reg.* v. *Chadwick* (3), and *Brook* v. *Brook*. (4) The last case establishes that such a marriage is void although celebrated in a country where it would be legal as between persons domiciled there. It was said, however, that none of those statutes had any application to Jews, and it was contended that two such persons, if of the Jewish persuasion,

(1) (1873) L. R. 6 H. L. 265.
(2) 44 Ch. D. 590.
(3) 11 Q. B. 173.
(4) 9 H. L. C. 193.

might according to English law contract a valid marriage. There is no decision to this effect. The argument was based on the language of Lord Stowell in the case of *Lindo* v. *Belisario* (1) and on that of the Legislature in various Acts of Parliament dealing with the subject of marriage. The history of the Jews in this country, so far as it is material to the present question, is given in a note to the report of *Lindo* v. *Belisario*. (1) After stating that the Jews appeared to have been brought here in considerable numbers by William I. from Rouen in 1070, and that they lived as bondsmen of the kings and under special protection, regulations, and exemptions till they were banished in 1290, the note proceeds as follows: "They did not appear again in this kingdom as a distinct body till the time of Charles II. They had petitioned in 1648 to be allowed to return and enjoy their religion; and the question was much agitated, but nothing was done. On the Restoration, Charles II. promised them protection and the use of their religion, and an Order of Council issued to that effect." The order is given in the Appendix, p. 3. It is dated November 13, 1685, and it provides as follows: "Upon reading this day at the board the petition of Joseph Henriques, Abraham Delivera, and Aaron Pacheco, overseers of the Jewish synagogue, and the rest of the Jewish nation, setting forth that his late Majesty, of blessed memory, having found the petitioners and their nation ever faithful to the government, and ready to serve him on all occasions, was pleased in February, 1673, to signify his royal pleasure, that whilst they continued quiet, true, and faithful to the government, they should enjoy the liberty and profession of their religion, which they accordingly peaceably exercised till Michaelmas Term last; that several writs out of the King's Bench, on the statute made in the 23rd year of Queen Elizabeth, had been taken out against forty-eight of the Jewish nation, by one Thomas Beaumont, and thirty-seven of them arrested thereupon, as they were following their occasions on the Royal Exchange, to the great prejudice of their reputation both here and abroad; and therefore praying his Majesty to permit and suffer them, as heretofore, to have the benefit

(1) 1 Hagg. Cons. 216.

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and free exercise of their religion, during their good behaviour towards his Majesty's government. His Majesty, having taken this matter into his royal consideration, was pleased to order, and it is hereby accordingly ordered, that his Majesty's Attorney-General do stop all the said proceedings at law against the petitioners; his Majesty's intention being, that they should not be troubled upon this account, but quietly enjoy the free exercise of their religion, whilst they behave themselves dutifully and obediently to his government."

From that time forward the Jews appear to have been permitted to reside in England and to practise the rites of their religion, and in particular to solemnize marriages according to their own usages. For a long time no legislative provision was made on the subject of their marriages; but by s. 18 of Lord Hardwicke's Act (26 Geo. 2, c. 33), intituled "An Act for the better Preventing of Clandestine Marriages," it is enacted that "nothing in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively, nor to any marriages solemnized beyond the seas."

In that state of things the case of *Lindo* v. *Belisario* (1) was decided. It was the first case in which the validity of a Jewish marriage was considered by an Ecclesiastical Court. In dealing with it Lord Stowell said: "This is a case which comes before this Court by the direction of the Lord Chancellor. Under the sanction of that high authority I shall certainly apply myself closely to the investigation of the question, though otherwise I should have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in this case. The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages, in cases of British subjects, and sometimes of aliens; and it does this from

(1) 1 Hagg. Cons. 216.

necessity, in order to prevent a failure of justice; and with the satisfaction of knowing, that the principles, which regulate English marriages, are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of Europe being founded on the same general principles, and having for its basis the antient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis. This is a question of marriage of a very different kind—between persons governed by a peculiar law of their own, and administered, to a certain degree, by a jurisdiction established among themselves—a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority. It would, therefore, have been a matter of grave consideration with me, if the question had been brought in the ordinary way, and without any such recommendation;—whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I cannot but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law." That language would not have been inappropriate if the question before Lord Stowell had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only; it was one of intricacy and difficulty, and I am unable to find anything in the judgment which indicates that the observations to which I have referred were directed to anything beyond that which the learned judge was called on to decide; certainly I cannot look on them as an authority for the proposition that the capacity of members of the Jewish faith to contract marriage is regulated by their own law and not by the law of this country. The question in *Reg.* v. *Millis* (1) was also one of form, and to it the remarks of Lord Brougham (2) and

(1) 10 Cl. & F. 534.

(2) 10 Cl. & F. 736.

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Lord Campbell (1), cited in argument, appear to have been addressed.

I now turn to the language of the statutes. Reliance was chiefly placed on that found in 6 & 7 Will. 4, c. 85, s. 2, and 3 & 4 Vict. c. 72, s. 5, where it is enacted that persons professing the Jewish religion "may continue to contract and solemnize marriage according to the usages . . . . of the said persons." It was contended that, inasmuch as contract was spoken of in addition to solemnization, it must be taken that the Legislature has treated as valid marriages contracted in accordance with the rules of the Jewish law, not merely as regards the form of marriage, but also as to the capacity of the contracting parties. I am unable to arrive at that conclusion. In the first place, the word "usages" is more apt with regard to matters of form than in relation to capacity of parties. Next, both these statutes (like 26 Geo. 2, c. 33) deal with the formalities of marriage, and an enactment with respect to capacity is, primâ facie at least, beyond the purview of them. Again, in the statute 10 & 11 Vict. c. 58, passed for the express purpose of removing doubts as to the validity of the marriages of Quakers and Jews "solemnized . . . . according to the usages of those denominations respectively," it is declared and enacted "that all marriages so solemnized were and are good in law to all intents and purposes whatsoever." That declaration and enactment, as it appears to me, relate to form only. It is further to be remarked that, although in the statutes just mentioned, as in many others relating to formalities of marriage (as, for example, 4 Geo. 4, c. 76, 19 & 20 Vict. c. 119, and 61 & 62 Vict. c. 58), there is found an express exception of Jewish marriages, there is no such exception in 5 & 6 Will. 4, c. 54, which deals with capacity. In my opinion, therefore, the marriage in question was not valid according to the law of England, and the residuary trust fund must be distributed on the footing of the testatrix's daughter, Eugenie, having died in her lifetime without leaving issue.

Solicitors for all parties: *Emanuel & Simmonds.*

(1) 10 Cl. & F. 794.

H. B. H.

HALL *v.* DUKE OF NORFOLK.

KEKEWICH J.

[1899 H. 190.]

1900

June 13, 14.

Mines—Subsidence—Injury to adjoining Land and Buildings—Liability of Owner—Damage caused by Act of Owner's Predecessor in Title.

The owner of minerals is not liable for damage caused to neighbouring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession.

Greenwell v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165, followed.

Darley Main Colliery Co. v. *Mitchell*, (1886) 11 App. Cas. 127, considered.

ACTION to have it ascertained what damage the plaintiff's house and property, situate at Overseal, near Ashby-de-la-Zouch, had suffered by reason of the working out of the main coal seam in the adjoining Moira Colliery of the defendants; a declaration that the defendants were liable to make good such damage; and payment accordingly.

The plaintiff was the owner in fee simple of his property, and he alleged that his house had been built more than fifty years before the acts complained of.

The plaintiff's land adjoined land of which the late Lord Donington was the owner in fee, and which comprised certain seams of coal, and a colliery carried on in connection therewith known as the Moira Colliery. In the years 1889 to 1891 Lord Donington worked one of the seams of coal in close proximity to the plaintiff's property.

Lord Donington died on July 24, 1895, having by his will dated April 2, 1892, devised and bequeathed all his real and personal estate to trustees upon certain trusts. The trustees, the Duke of Norfolk and G. E. Lake (since deceased), carried on the business of the colliery as trustees under a power in the will from the death of the testator to October 1, 1895, and from that date to November 16, 1895, as agents for Messrs. Wilkinson, Newton & Spalding. On November 16, 1895, they agreed to demise the colliery to Wilkinson, Newton & Spalding

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for a term of twenty-one years from October 1, 1895, and on November 20, 1895, Wilkinson, Newton & Spalding assigned the benefit of the agreement, and gave possession of the colliery to the Moira Colliery Company. The lessees did not enter into any covenant to prevent damage by subsidence. In and subsequently to November, 1895, subsidences occurred in the plaintiff's land, and the walls and ceilings and various other parts of the house cracked. This was in consequence of the workings by Lord Donington between 1889 and 1891, and was not traceable to any act of the trustees or their lessees. In 1896 an action to administer the estate of the late Lord Donington was brought by a creditor. On March 25, 1897, the plaintiff in the present action carried in a claim in the administration action against the estate for 2000*l.* in respect of the damage alleged to have been caused to his property by the subsidence. The claim came before Kekewich J. for adjudication on December 17, 1898, when it was dismissed with costs, the judge being of opinion that the claim was in the nature of a personal action which was determined by the death of Lord Donington. The plaintiff then brought this action against the trustees and Messrs. Wilkinson, Newton & Spalding, and the Moira Colliery Company. He alleged that no steps were ever taken by Lord Donington during his life, or by any of the defendants subsequently, to prevent the plaintiff's land and buildings from being damaged by reason of the working of the seam.

It was not exactly proved when the damage to the plaintiff's property first occurred, but the inference drawn by the judge from the evidence was that it did not occur until at any rate after the demise by the trustees to the lessees.

P. O. Lawrence, Q.C., and *MacSwinney*, for the plaintiff. This colliery was in a dangerous condition in 1895, and it was physically possible for the defendants to prevent the subsidence. The defendants not having taken steps to put the colliery into a safe condition, they are liable for the injury occasioned by the subsidence, although it was caused by the act of their predecessor. The claim for damages arises when the injury takes

place, and it is against the owner of the property for the time being. The doctrine of *Rylands* v. *Fletcher* (1) applies to this case. The Duke of Norfolk, the surviving trustee, is liable as reversioner upon the principle that if a man acquires property with a continuing nuisance upon it, and then lets the property without either putting an end to the nuisance himself or compelling his lessees to do so, he is responsible for the continuance of the nuisance during the term: *Rex* v. *Pedly* (2); *Todd* v. *Flight* (3); *Pretty* v. *Bickmore* (4); and the lessees are also liable, notwithstanding that the nuisance existed before they took possession: *Broder* v. *Saillard*. (5) *Darley Main Colliery Co.* v. *Mitchell* (6) is very like this case, and it is important as shewing that the cause of action does not arise till the subsidence takes place.

It is true that the decision of Bruce J. in *Greenwell* v. *Low Beechburn Coal Co.* (7) is adverse to the plaintiff's claim; but we submit that it is inconsistent with the current of authority, and especially with *Backhouse* v. *Bonomi* (8) and *Darley Main Colliery Co.* v. *Mitchell* (6), and ought not to be followed.

Warrington, Q.C., and *Kenyon Parker*, for the defendant the Duke of Norfolk, the surviving trustee. Unless this case can be brought within the principle of *Todd* v. *Flight* (3) this action must fail. In that case it was held that there was a duty on the lessor to keep the property in a safe condition. Here there is no obligation on the lessor to put back the minerals which have been excavated, and he is not liable unless the wrong causing the damage arises from his misfeasance or nonfeasance. There is no authority that a man who acquires land with a cavity in it is bound to fill it in. *Greenwell* v. *Low Beechburn Coal Co.* (7) admittedly covers this case, and it is not really inconsistent with *Darley Main Colliery Co.* v. *Mitchell*. (6) In the latter case the question to be determined arose under the Statute of Limitations, and was as to the time when the

(1) (1868) L. R. 3 H. L. 330.
(2) (1834) 1 Ad. & E. 822; 40 R. R. 444.
(3) (1860) 9 C. B. (N.S.) 377.
(4) (1873) L. R. 8 C. P. 401.
(5) (1876) 2 Ch. D. 692.
(6) 11 App. Cas. 127.
(7) [1897] 2 Q. B. 165.
(8) (1861) 9 H. L. C. 503.

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cause of action was complete. The House of Lords did not determine against whom the action could be brought. It was held that the cause of action was complete when the damage by subsidence occurred; because it is not the removal of the minerals by the defendant, the owner of them, which gives rise to the cause of action, but the damage to the plaintiff resulting from the removal, and unless these two elements exist in combination the cause of action against the defendant cannot be complete.

[KEKEWICH J. referred to the remarks on *Backhouse* v. *Bonomi* (1) in the judgment of Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell.* (2)]

The person who happens to be owner at the time of the subsidence is not liable for that which is the result of an act of one of his predecessors, committed, it may be, many years ago. The question might arise in such a case, for instance, as *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (3), where subsidence was caused by drainage of subsoil owing to an excavation in neighbouring land. To make a man liable for a subsidence, he must have done something to cause it. The mere possession of land with a cavity in it made by some one else is not sufficient.

There is no evidence of any damage continuing during the time of the defendants' possession. The case is not like *Todd* v. *Flight.* (4) In that case the lessor of the premises which were the cause of the damage was held liable because he had assumed a responsibility himself. In *Pretty* v. *Bickmore* (5) the landlord was held not liable for the accident caused by the premises being out of repair, he having no duty to keep them in repair.

The trustees had no duty to prevent the subsidence, and there is no evidence that they could have prevented it even if they had such a duty.

Renshaw, Q.C., and *Ashton Cross*, for the defendants other than the Duke of Norfolk. There is no evidence that apart

(1) 9 H. L. C. 503.
(2) 11 App. Cas. 141, 142.
(3) [1899] 2 Ch. 217.
(4) 9 C. B. (N.S.) 377.
(5) L. R. 8 C. P. 401.

from the additional weight of the house there would have been any subsidence at all. If the case depends on the house, it is not a case of natural support, but of an easement for a house which was erected more than twenty years ago: *Dalton* v. *Angus*. (1) The lessees cannot be liable for an interference with an easement committed before they came into possession. It was not caused by an act of theirs.

There are two things which give a right of action in cases like this—the removal of the minerals which produces the cavity, and neglect to provide artificial support: *Mitchell* v. *Darley Main Colliery Co.* (2); *Greenwell* v. *Low Beechburn Coal Co.* (3) The lessees had nothing to do with the removal of the minerals. Neither were they negligent in not filling up the cavity. They could not be liable in that respect unless they had some duty in the matter, and they had none: *Pretty* v. *Bickmore*. (4) The mere fact of their being in possession cannot make them liable for what took place before they came into possession.

The decision of Bruce J. in *Greenwell* v. *Low Beechburn Coal Co.* (3) is not inconsistent with what was held by the House of Lords in *Darley Main Colliery Co.* v. *Mitchell*. (5) The point there was the same as the point in this case, and it is an authority that no damages ought to be given against the lessees.

P. O. Lawrence, Q.C., in reply.

KEKEWICH J. referred to the facts, observing that the working of the coal by Lord Donington was a perfectly rightful act, and that the subsidence resulting therefrom had caused the plaintiff damage in respect of which he might have maintained an action against the late Lord Donington. He continued:—The damage not having occurred until the end of 1895, according to settled law the right of action did not accrue until then. The Statute of Limitations, therefore, does not apply, and the matter for consideration is whether the

(1) (1881) 6 App. Cas. 740.
(2) (1884) 14 Q. B. D. 125, 129.
(3) [1897] 2 Q. B. 165, 173, 176.
(4) L. R. 8 C. P. 401.
(5) 11 App. Cas. 127.

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plaintiff can recover damages, to be ascertained by some means or other, as against the defendants whom he has brought before the Court. The question then arises "whether, on the general principles of law, the defendants can be rendered liable upon the ground that they have allowed a nuisance to continue on their land which has caused damage to the plaintiff." Those are the words of Bruce J. in his judgment in *Greenwell* v. *Low Beechburn Coal Co.* (1) He was there stating the question which he had to decide, which is precisely that which I have to decide, and he decided it against the plaintiff in that case, and in favour of the defendants. It is possible that I might be doing my duty if I were simply to follow that decision; but I have thought it right to consider the question for myself. The decision of Bruce J. was pronounced only three years ago, and has not, so far as I am aware, been cited or commented upon in any other case. It was admitted by him that there was no reported case or judicial decision upon the point except one by the present Lord Justice Collins, of which he could not get any trustworthy report, and upon which, therefore, he declined to say anything. Besides that, it is said here that the decision of Bruce J. is not consistent with the decision of the House of Lords in *Darley Main Colliery Co.* v. *Mitchell.* (2) Under those circumstances I have heard full argument, and have also taken the opportunity afforded by the adjournment from yesterday to look into the case and fully consider it.

Unless I am controlled by the decision in *Darley Main Colliery Co.* v. *Mitchell* (2), or by the opinion of Lord Blackburn in that case, it seems to me that I am not at liberty to do that which I must do if I acceded to the plaintiff's contention —namely, create a right of action, which has never yet been recognised in a court of law. Without going through the argument which formed the basis of the judgment of Bruce J., I may say that I entirely agree with the learned judge from beginning to end. He puts his decision on this ground (3)— the ground which has been much insisted upon in the argument on behalf of the Duke of Norfolk—"What act has been done

(1) [1897] 2 Q. B. 165, 173, 176. (2) 11 App. Cas. 127.
(3) [1897] 2 Q. B. 177.

which it was the duty of the defendants to take due care to prevent? The answer must be that they have not taken due care to prevent the subsidence." Every word of that applies to the present case. Then he adds: "But what duty was there on their part to prevent subsidence? They had taken no part in the excavation." That also applies to the present case. Then further on he says: "Unless they are under an obligation to prevent the consequences of an act done by their predecessor in title, they have not been guilty of any omission of duty for which they can be rendered liable. It is suggested that the excavated strata left without any artificial support amounted to a nuisance; but I do not think they did. Until the actual subsidence happened there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon anyone to provide artificial support; and, therefore, it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things." That latter passage expresses in other words the opinion of Lord Bramwell in *Darley Main Colliery Co.* v. *Mitchell* (1), where he draws the distinction between the case of a thing directly wrongful in itself, the case "where the wrong is not actionable in itself, is only an injuria, but causes a damnum," and, thirdly, the class of cases "where the act causing damage is not in itself wrongful" (which is the case with which Bruce J. was dealing and with which I am dealing), and the only wrong is attributable to the damage which has been caused.

It was said here that the case came within *Todd* v. *Flight* (2); but in that case there was a clear breach of duty. A man in possession of premises on which there was a stack of chimneys in a dangerous condition, and therefore a nuisance, demised to a tenant without putting him under any terms to repair the chimneys, and the result was that the chimneys fell and injured the neighbour, and then the lessor was held liable on the ground that it was his duty to repair the chimneys, or, at any rate, to see that the tenant repaired them. The plaintiff also

(1) 11 App. Cas. 144, 145. (2) 9 C. B. (N.S.) 377.

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relied on *Rex* v. *Pedly*. (1) As to that case, it is sufficient for me to read what was said by Cresswell J. in delivering the judgment of the Court in *Rich* v. *Basterfield*. (2) He said: "If *Rex* v. *Pedly* (1) is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it." That puts the basis of the decision in *Rex* v. *Pedly* (1) as well as of that in *Todd* v. *Flight* (3) on the ground of duty. *Pretty* v. *Bickmore* (4), where *Todd* v. *Flight* (3) was referred to by Bovill C.J., agrees with that. In that case also the decision was based on the ground of duty. There there was a plate over a coal-cellar which was in a dangerous state, and the defendant, who was the landlord, had let the premises to a tenant taking from him a covenant to repair, and it was held that, the duty of keeping the premises in repair being by the lease cast upon the tenant, the landlord was not liable. That is instructive in this way. It might be argued in such a case that as between the plaintiff and the defendant the delegation of the defendant's duty to the tenant was no answer, and that the plaintiff was entitled to say, "You let the premises in a dangerous condition, as did the landlord in *Todd* v. *Flight* (3), and it is no answer to me to say that you have obtained a covenant from somebody else, your tenant, to do that which you ought to have done yourself. That is a matter between you and him, and I am entitled to sue you for your neglect notwithstanding that you have a right of action over against the tenant for his neglect." But that argument did not prevail in *Pretty* v. *Bickmore*. (4) It was held that the person who

(1) 1 Ad. & E. 822; 40 R. R. 444.
(2) (1847) 4 C. B. 783, 805.
(3) 9 C. B. (N.S.) 377.
(4) L. R. 8 C. P. 401.

was directly liable to repair, not to the plaintiff, but whose duty it was to repair, was liable, and not the person on whom that duty was not cast. It seems to me, therefore, that unless it can be shewn that Bruce J. misunderstood the case of *Darley Main Colliery Co.* v. *Mitchell* (1), so that his decision does not really apply in this case, this action must fail on the grounds which satisfied him in *Greenwell* v. *Low Beechburn Coal Co.* (2)

Turning now to *Darley Main Colliery Co.* v. *Mitchell* (1), it seems to me that that case, when properly understood, has very little to do with the present case. The question there arose in this way. It had been settled by previous decisions, and particularly by *Backhouse* v. *Bonomi* (3), that where a subsidence occurred through coal workings the right of action on the part of the person damaged by the subsidence arose when the damage occurred, and not when the coal was removed; and, therefore, the Statute of Limitations ran from the latter date and not from the former. Then arose the further question, whether, when coal is worked, and after a time a subsidence occurs in consequence of that working, and after further time, it may be several years, a further subsidence occurs in consequence of the same working, the right of action is one and the same throughout. If so, the neighbour being damaged would be bound to recover the whole damage in an action on the first subsidence, estimating as best he could the possible damage to be caused thereafter, and the Statute of Limitations would run against him, and he might find himself barred if another subsidence and further damage did not occur for some years. That was what gave rise to the discussion in *Darley Main Colliery Co.* v. *Mitchell* (1), and the House of Lords decided that there was a new cause of action with the new subsidence and the new damage. That was the whole of the decision in that case. I cannot find that the House disposed of any other question at all; but Lord Blackburn dissented from that, and his judgment of course deserves the closest attention. It is not, perhaps, one of his Lordship's most forcible judgments, but still, on reading it through, I have no doubt as to his

(1) 11 App. Cas. 127. (2) [1897] 2 Q. B. 165.
(3) 9 H. L. C. 503.

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meaning. He admitted the general principle that all the damages must be recovered at once, in one and the same action. He went through all the authorities, and came to a conclusion differing from that at which all the other members of the House who took part in the decision arrived. That does not affect this case in the least, but towards the end of his judgment (1) he quotes the following passage from the judgment of Bowen L.J. in the Court below (2): "Applying the reasoning of *Whitehouse* v. *Fellowes* (3), it seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support." Bowen L.J. had applied the reasoning of *Whitehouse* v. *Fellowes* (3), and came to that conclusion in fact and in law; and Lord Blackburn says: "If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts." It is perfectly clear that what Lord Blackburn means there was this: "If I could see my way to agreeing with the Lord Justice, that really there had been a continual withdrawal of support and not merely an original excavation or act done, then I should agree also in the conclusion at which he arrived, but I cannot take that view of the facts"; and then he adds: "One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked-out seam lay would be liable to an action for continuing a nuisance. Surely, the facts cannot be such as would produce that effect." I suppose he did not mean that the facts could not be so, but that it would take a good deal to drive him to conclude that the facts were such as to produce that effect. On studying it I cannot see any other way of reading it than as an expression of opinion directly contrary to the present plaintiff, and not in his favour. Lord Blackburn in effect says: "I cannot believe that the facts are such as to induce the legal conclusion that where an owner in fee of coal works it out and dies his heir or devisee is liable for continuing nuisance." Yet that is the very position that the plaintiff takes up in

(1) 11 App. Cas. 144. (2) 14 Q. B. D. 138.
(3) (1861) 10 C. B. (N.S.) 765, 784.

this case. I find it extremely difficult to see why it should be said that Lord Blackburn in that part of his judgment was differing from the conclusion of the House of Lords. He is not commenting upon that. He is quoting the language of Bowen L.J., and saying that he did not see his way to agree with his facts, and, therefore, he could not agree with his conclusion. Moreover, I have support for that view, for Bruce J., after referring to this part of Lord Blackburn's judgment, says (1): "When the passage of Lord Blackburn's judgment is carefully examined it seems to me that it does not afford support to the contention that such consequences as he mentions follow from holding the Darley Main Colliery Company liable upon the grounds upon which the House of Lords held them liable."

That seems to me to entirely dispose of the case, and I need not go into the question raised as against the lessees; the case as to them is covered by my decision in favour of the Duke of Norfolk. Nor need I consider the question whether the defendants might, if they had been so minded, or if any duty had been cast upon them to do it, have prevented this damage by doing something. [His Lordship, however, dealt briefly with the evidence on this head, and concluded as follows:—]

It is not proved here that if the cavity had been filled up the subsidence would not have taken place just the same. Therefore, even if I thought that the point was of importance—which, in the view I take of the case, it is not—I should have been obliged to decide against the plaintiff on that point also.

The result is that my judgment is for the defendants with costs.

Solicitors: *Woodcock Ryland & Parker, for Woodcock & Sons, Haslingden; Wordsworth, Blake & Co.; Kingsford, Dorman & Co., for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouch.*

(1) [1897] 2 Q. B. 176.

KEKEWICH J.

1900

July 18.

PEPIN *v.* BRUYÈRE.

[1899 P. 748.]

Conflict of Laws — Domiciled Foreigner — Unattested Will — Immovables — Leaseholds — Administration with Will annexed — Lex rei sitæ — Lex Domicilii — Wills Act, 1837 (1 *Vict. c.* 26), *s.* 9.

The beneficial interest in leasehold property in England will not pass under the will of a domiciled foreigner executed according to the law of his domicil, but not attested as required by the Wills Act, notwithstanding that letters of administration with the will annexed have been granted by the Probate Division.

THIS action was set down for argument upon the following question of law—whether the beneficial interest of Charles Villette, a domiciled French subject, in a leasehold house in England passed by virtue of his unattested will to the defendant Charles Larnaude, the specific legatee thereof, or whether the testator died intestate as to his beneficial interest in the said house.

For the purpose of this question the facts were agreed as follows:—

Charles Villette was a French subject, having his domicil of origin in France, and at the respective dates of his will and death he was domiciled in France. At those dates he was beneficially entitled to four-fifteenths of a leasehold house, No. 158, New Bond Street, the said four-fifteenths having been demised for a term of forty years (perpetually renewable upon the payment of a fine) to F. B. Garnett, by whom they were held in trust for Villette. On May 15, 1890, Villette made in France a holograph will in the French form and language, whereby he appointed the defendant E. P. Bruyère his universal legatee, upon condition that he satisfied certain legacies therein mentioned and paid the testator's debts, and among the legacies comprised in the will was a specific bequest to the defendant Larnaude of the four-fifteenths of the house in question.

The will was not attested, but it was valid by the law of France.

On September 24, 1895, the testator died in Paris.

On February 5, 1897, letters of administration, with the will, or a translation thereof, annexed, of the personal estate of the testator were granted out of the Principal Registry of the Probate Division to the defendant Bruyère.

The plaintiffs represented the next of kin of the testator.

P. O. Lawrence, Q.C., and *Jason Smith*, for the plaintiffs. The beneficial interest of the testator in this leasehold house in England did not pass under his unattested will, though executed in accordance with the law of his domicil. For the present purpose leaseholds are like real estate; they do not follow the person: *Freke* v. *Lord Carbery* (1), and will not pass, except by a will attested in accordance with the law of England—i.e., in accordance with the Wills Act: 1 Jarman on Wills, 5th ed. pp. 2, 5, note; Dicey's Conflict of Laws, pp. 72, 73, 519, 520. This leasehold property is held in trust for the next of kin according to the Statute of Distributions: *Duncan* v. *Lawson*. (2)

Warrington, Q.C., and *Mackay*, for the defendants. This is the will of a domiciled Frenchman; consequently, qua personalty, the Wills Act does not apply. In the case of a will of a domiciled foreigner, probate or letters of administration cum testamento annexo will not be granted unless the will conforms to the law of the domicil, and will be granted if it does conform to that law, even though not executed according to the formalities required by the law of England. The title of the executor is not derived from the document, but from the probate, and he must deal with the leaseholds which come to him as executor according to the provisions of the will, unless those provisions are illegal according to the law of England in a matter of substance; and for this purpose there is no difference between an executor and an administrator cum testamento annexo. Assuming that a will of leaseholds requires execution in a particular manner by the Wills Act,

(1) (1873) L. R. 16 Eq. 461, 466. (2) (1889) 41 Ch. D. 394.

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it does not follow that they cannot pass by the will of a domiciled foreigner, executed according to the law of the domicil: *Bremer* v. *Freeman* (1); *In re Price* (2); *Croker* v. *Marquis of Hertford* (3); *Hood* v. *Lord Barrington* (4); Westlake on Private International Law, ss. 164, 169. For the present purpose there is an essential difference between matters of form and matters of substance. In *Freke* v. *Lord Carbery* (5) the will contained limitations infringing the law against perpetuities; in *Duncan* v. *Lawson* (6) the disposition was a violation of the Mortmain Act. Of course, apart from the Land Transfer Act, 1897, the question cannot arise as to real estate, because that would not pass to the executor; but the leaseholds vest in the executor by common law, and he must administer them according to the terms of the instrument.

De Fogassieras v. *Duport* (7) is the only authority which in any way conflicts with the above contention. That was the converse case, in which the will of a domiciled foreigner, executed in the manner required by the Wills Act but not in the manner required by the law of France, was admitted to probate in Ireland, so far as it disposed of chattels real; but the authorities there cited were all cases in which the defect was one not of form but of substance, and we submit whether that case was rightly decided. After the will has been admitted to probate or letters of administration with the will annexed have been granted, form ceases to be material.

P. O. Lawrence, Q.C., in reply. No case can be found in which leaseholds have been held to be validly bequeathed unless the will has been executed according to the Wills Act. This is really an attempt to substitute the lex domicilii for the lex situs as regards immovables.

KEKEWICH J. It might be doing an injustice to the argument urged on behalf of the defendants to say that it goes so

(1) (1857) 10 Moo. P. C. 306, 359.
(2) [1900] 1 Ch. 442.
(3) (1844) 4 Moo. P. C. 339, 361.
(4) (1868) L. R. 6 Eq. 218, 222.
(5) L. R. 16 Eq. 461.
(6) 41 Ch. D. 394.
(7) (1881) 11 L. R. Ir. 123.

far as this—that a will of a foreigner, in order to pass real estate or chattels real in England, need only be a will valid according to the law of the domicil; but certainly I understand the argument to go to this extent, that when once the will has been ascertained to be according to the law of the domicil, and therefore admissible to probate, then all question as regards real estate and chattels real ceases, and the will must operate as if it were to all intents and purposes a valid will. Reliance was placed so strongly upon *Bremer* v. *Freeman* (1) that I was not sure that the first statement of the contention was not that which the defendants' counsel wished me to adopt. That was a very well known case. I will just read two lines from the head-note: "The forms and solemnities of a will are governed by the law of the domicil of the testator." That is really all that was decided in that case for the present purpose. But in the Irish case, *De Fogassieras* v. *Duport* (2), there arose the further point, not at all conflicting, of course, with *Bremer* v. *Freeman* (1), whether the testamentary law of England, being also the law of Ireland for this purpose, was applicable to a will disposing of chattels real so as to make it necessary that the formalities prescribed by the Wills Act should be observed before the will could be regarded as valid for that purpose. It arose there in a peculiar way. The testator had made a will executed according to the Wills Act, but it had not been made in the form required by the law of France, he being a French subject and domiciled in France, so that the principle of *Bremer* v. *Freeman* (1) had to be applied with reference to a will which contained, amongst other dispositions, a disposition of chattels real in Ireland, and the Court held there that the will must be good as regards the chattels real because the will was executed as required by the Wills Act, but that it would not be good as regards movables because it was not executed according to the law of the domicil. Therefore, adopting that rule, they granted a limited probate—that is to say, a probate limited to chattels real, rejecting the will as a will of movables. Mr. Dicey, in his book on the Conflict of Laws, p. 523, refers to that in this way: "This case is an

(1) 10 Moo. P. C. 306. (2) 11 L. R. Ir. 123.

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Irish case and refers to land in Ireland, but undoubtedly is sound in principle and applies to immovables in England. Note that the will, which also contained bequests of movables, was, as regards them, invalid, as not being executed in accordance with the testator's lex domicilii." That case, therefore, seems to me not in any way to conflict with the principle established by the case of *Bremer* v. *Freeman* (1), which is perfectly well settled law, but to shew that it does not apply to real estate or chattels real, and to shew, further, that because a will is admissible to probate it does not by any means follow that it takes effect as to immovables—i.e., real estate or chattels real. That seems to be the weakness of the defendants' case. Reliance was also placed upon *Hood* v. *Lord Barrington*. (2) There a will had been admitted to probate, and the executor under that will proposed to sell qua executor, and his title to sell was questioned, and, being questioned, was upheld, and the reason why it was upheld is explained thoroughly in Lord Romilly's judgment; but it is further explained in a note in the 5th edition of Jarman on Wills, vol. i. p. 5, in which it is said: "Since the rule mobilia sequuntur personam is inapplicable to leaseholds it follows (subject to 24 & 25 Vict. c. 114, s. 2, presently stated, and which speaks of 'personal' estate) that to dispose of leaseholds a will must be executed according to 1 Vict. c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here, and will enable the executor to sell leaseholds (*Hood* v. *Lord Barrington* (2)), will not operate on the beneficial interest. The title of the executor is from the probate: the beneficial interest will devolve as undisposed of." As I said, the weak point in the defendants' argument seems to me to be this—that it assumes that when once the will is admitted to probate everything is done, and it is no longer necessary to consider whether the will is a good disposition of chattels real or real estate in this country. Here we have the will of a foreigner, a Frenchman, which, although not strictly proved here, is on the records of the Court as annexed to a grant of letters of administration, which for this purpose is equivalent to probate.

(1) 10 Moo. P. C. 306. (2) L. R. 6 Eq. 218.

Now, it is strange that there is no direct authority upon the exact point which I have to decide; but this is perfectly clear, not only from the text-books, but also from the judgment of Lord Selborne in *Freke* v. *Lord Carbery* (1), that for the purpose of the present question leaseholds are equivalent to real estate —that is to say, that all the doctrines as to the operation of the lex rei sitæ are equally applicable to leaseholds and to real estate. So far I have judicial authority. Beyond that I have not. But there is a strong concurrence of opinion among the text-book writers quoted upon the question which I have to decide. There is the authority of Jarman on Wills, which, although not dealing directly with international law, still necessarily does indirectly do so in connection with wills, and there we have a distinct expression of opinion in the text of the book (p. 2) and also in the note (p. 5), which I have already quoted. Mr. Dicey, also, is perfectly clear on the subject. It is true he does not put forward any authority in support of his view, because there seems to be none; but he does not express his opinion as if it was a thing in doubt, as text-writers necessarily often do. He says (p. 520): "The formalities required for the devise of immovables, whether realty or personalty, the restrictions (if any) on such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England." Then, in that convenient series of illustrations which help one to understand the book, he gives, under s. 15, on p. 522, the very case which we have here: "A domiciled Scotchman dies possessed of freeholds and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of England."—i.e. no will which will pass property of that description—"The freeholds descend to his heir according to the law of England (lex situs). The leaseholds devolve upon the deceased's next of kin, as determined by the Statute of Distributions (lex situs)."

In one sense the question is a new one—that is to say, in the sense that there is no judicial authority upon it; but in another sense it is not new at all. It seems to have occurred to the

(1) L. R. 16 Eq. 461.

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text-writers and to have been embodied by them in books which are known in the profession, and which are, in many respects, accurate statements of the law, and it has been treated by them as free from doubt.

I must hold that this leasehold property, being part of the soil of England, and therefore, as Lord Selborne puts it, as much an interest in land as if it was freehold, is not disposed of by a will which does not comply with the formalities prescribed by the Wills Act, and that, notwithstanding that the will has been recognised as an instrument admissible to probate, so that the administrator can claim under the authority of the Probate Division.

Solicitors: *Baker & Nairne; Herbelet.*

H. B. H.

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COZENS-HARDY J.

[1899 S. 1666.]

1900

Voluntary Association—Clifford's Inn—Inn of Chancery—Failure of Objects—Charity.

May 17, 24; *June* 19.

By an indenture of feoffment of March, 1618, a messuage and premises known as Clifford's Inn was assured to certain members of the society, as trustees, in consideration of 600*l*., with a declaration that the true intent and meaning of the deed was, that the said messuage "shall for ever hereafter retain and keep the same usual and ancient name of Clifford's Inn and shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of that society and for the benefit of the Commonwealth as aforesaid, and not otherwise, nor to any other use, intent or purpose." The property had long been dealt with by the society as its own, and for its own purposes, and the surviving members of the society contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit:—

Held, that the deed of 1618 negatived the idea of private ownership, and proved a dedication to public or charitable objects, and that the property now vested in the present trustees must be held by them upon trust for charitable purposes.

ACTION.

The subject-matter of this action was the property known as Clifford's Inn, situate behind St. Dunstan's Church, on the north side of Fleet Street, in the City of London. The plaintiffs were five of the existing sixteen members of the society, and the defendants were the remaining eleven members and Her Majesty's Attorney-General. The plaintiffs claimed—(1.) that the trusts relating to the said property might be administered under the direction of the Court; (2.) a declaration that the property was not subject to or affected by any charitable trust; and (3.) that the rights of the parties beneficially interested in the said property might be ascertained and declared.

In ancient times the property belonged to the Clifford family (Earls of Cumberland and Lords Clifford), from whom it derived its name; it had for centuries been held by or on behalf of a society known as the Society of Clifford's Inn,

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which was one of the ancient Inns of Chancery: the society was not a corporate body. The date of the foundation of the society and its early history were not known, but it appeared to have been in existence at and long prior to the indenture of feoffment hereinafter mentioned as a club or association of lawyers and law students, who occupied the property (then consisting of a mansion-house and garden) as tenants of the Earls of Cumberland and Lords Clifford.

By an indenture of feoffment dated March 29, 1618, and made between the Earl of Cumberland and Lord Clifford of the first part, Nicholas Sulyard, Principal of Clifford's Inn, and twelve other named persons described as Rules of the same house of the second part, and Richard Prescott and Richard Antrobus of the third part, it was witnessed "That the sd Right Honble. Earle and Lord Clifford having an honorable intent and care That the capitall messuage commonly called Clifford's Inn before menconed, with the appurtenances thereonto belonging, being the antient inheritance of the sd Earle and Lord Clifford and of their ancestors, and wch hath bene for many yeares heretofore by the allowance of the sd Earle and his ancestors the Earles of Cumberland and Lord Cliffords used and employed as an Inn of Chauncery for the furtherance of the study and practise of the Common Lawes of this his Majesties Realme of England, and during all that tyme hath bene ordered and governed by the Principall and Rules of the sd House for the tyme being in very good sort and with great discrecion both to the good of the Common welthe and to the honor of the sd Earle and Lord Clifford and their ancestors, may now upon the humble suite and earnest desire of the sd Principall and Rules and other the Practisers and students of the sd Societe be assured estated and settled as the same shall and may for ever hereafter contynue and be employed as an Inn of Chauncery for the furtherance of the Practisers and Students of the Common Lawes of this Realme as afsd And that the Principall Rules and other the gent of the same Societe may from henceforth be assured of a certen estate therein Doe principally for that purpose intent and consideracon and for and in consideracon of the some of six

hundred pounds to them by the sd [Principall and Rules] for and on behalf of themselves and the rest of the gent of the same Societe of Clifford's Inn aforesaid at or before the sealing and delivery of these presentes well and truly satisfyed contented and payd." . . . . "They the said Earle of Cumberland and Lord Clifford have granted bargayned and solde aliened enfeoffed and confirmed . . . . unto the sd Nicholas Sulyard and Robte Clinch and their heires for ever All that the sd Capitall Messuage with the apptences commonly called or knowne by the name of Clifford's Inn" Except and reserved out of the grant unto the sd Earl and Lord Clifford and to their heirs out of the garden commonly called Clifford's Inn Garden a certain strip of land, to hold the same unto and to the use of the sd Nicholas Sulyard and Robt Clinch and their heirs for evermore "to the intent and purpose afsd" to be holden of the Chief Lord of the fee and yielding and paying therefore to the Earl and Lord Clifford their heirs and assigns the yearly rent of 4*l*. And after certain clauses to which it is not necessary to refer, and a provision for suffering a common recovery to enure to the use of the parties of the second part and their heirs for ever to the intent that the said Earl and Lord Clifford, their heirs and assigns, might for ever thereafter levy, retain, and take up the said yearly rent of 4*l*., the deed proceeded as follows: "And yt ys further agreed by and betweene all the sd parties to these presentes and the true intent and meaning hereof and of all the sd parties is that the said capitall messuage now called by the name of Clifford's Inn shall for ever hereafter reteyne and keep the same usuall and antient name of Clifford's Inn, and shall for ever hereafter be contynued and employed as an Inn of Chauncery for the good of the gentlemen of that Societe and for the benefytt of the Commonwelthe as aforesd, and not otherwise, nor to any other use intent or purpose." The deed contained a further provision that the Earl and Lord Clifford and their heirs should from time to time from and after the death of one Nicholas Gibbon have the full disposition of a certain chamber within Clifford's Inn at their wills and pleasures to any such person or persons being at that time a fellow of Clifford's Inn as he or they or any of them should

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employ in their affairs and occasions. The deed also contained a clause for the appointment of new trustees, "and yt ys further agreed by and betweene the sd parties and the true intent and meaning thereof is that whensoever so many of the sd parties to these presentes to whom the use is before in these presentes lymytted shall happen to die and the number of them shal be but fyve and noe more of them shal be then living that the Survyvors of them shall and will at any tyme thereafter upon request soe convey and assure the said capitall messuage and other the premisses with their appurtenances (except before excepted) as the estate thereof may vest in the Principall of the sd house for the tyme being and the Rules and such other persons of that Societe as will make up the number of twelve or tenn at the least and be from tyme to tyme perpetually stated in the sd premisses as feoffees thereof to the intents and purposes before expressed and declared." New trustees of this deed were from time to time appointed, and at the date of the commencement of this action there were eight trustees, in whom the property was vested; the members of the society at this time, including the trustees, consisted of sixteen persons only.

The action was commenced in May, 1899, with the object of determining whether the property was subject to or affected by any charitable trust, or whether it was held by the trustees as private property for the individual members of the society for their own personal benefit, to be divided or disposed of as they might think fit.

The plaintiffs' case, according to their statement of claim, was as follows: That the society was a voluntary one; that it had always made its own rules and regulations as to the election or admission of members, the rights and privileges which they should enjoy, and the conduct and management of its affairs (including the disposition of its property), and that it had never been subject to any visitatorial jurisdiction or outside control. The statement of claim then proceeded as follows: "Prior to the year 1885 the society consisted of a principal, a body of members sometimes called the Principal's Council, but more generally called the Rules, and a lower order of

members called the Junior Fellows or Kentish Mess. The Principal and Rules were sometimes called the Upper Table, and the Kentish Mess the Lower Table. The rules and regulations governing the society were made by the Principal and Rules, and were from time to time altered by them at their will and pleasure. In the year 1885 the distinction between the two tables was abolished, the whole of the then members of the Kentish Mess were called to the Upper Table, and the Kentish Mess ceased to exist.

"The society has always been composed of lawyers or law students. For many years past it has consisted entirely of barristers and solicitors. No one has a right to require admission to the society, and there has never been any obligation on the society to elect new members. In former times it was the custom for the society to have moots and lectures upon legal subjects, but these were exclusively for the benefit of the members. They were held and regulated at the will of the Principal and Rules, and they have long since been given up. For several years past it has been the practice for the society to grant a sum annually to the Incorporated Law Society for a prize for legal studies, but these have been voluntary grants which might be made or withheld at pleasure. The society has no library; it does not impart any instruction and is not an educational body.

"The property has always been enjoyed and dealt with by the society as its own property and for its own purposes. From time to time new buildings have been erected and alterations have been made at the expense of the society. The enjoyment of the property by the society has never been controlled or interfered with by any person."

A number of old authorities, histories, and records were referred to at the trial to shew the position and status of the society as an Inn of Chancery at the date of the feoffment of 1618, the material parts of which, and the subsequent history of the society, are sufficiently stated in the judgment.

Vernon Smith, Q.C., and *Borthwick*, for the plaintiffs. The society is, and always has been, a voluntary association formed

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for the benefit of the members themselves. Legal education, no doubt, formed one of the subjects promoted by the society, but the property of the society belongs to the members for their own personal benefit, and is not affected by any charitable trust.

[They referred to *In re Clark's Trust* (1); *Cunnack* v. *Edwards* (2); *In re Buck* (3); *Attorney-General* v. *Eastlake* (4); *Anon.* (5); *Carne* v. *Long* (6); *Cocks* v. *Manners.* (7)]

The references to the Inns of Chancery in authorities contemporaneous with the deed of feoffment shew that they were purely voluntary societies.

[They referred to Fortescue, de Laudibus Legum Anglie, cap. 49; Coke's Reports, Part 3, Preface to Reader.]

The Courts have always refused to interfere with the internal government of these Inns: *Rex* v. *Gray's Inn* (8); *Rex* v. *Lincoln's Inn* (9); *Rex* v. *Barnard's Inn.* (10)

Hon. E. C. Macnaghten, Q.C., and *F. Thompson*, for some of the members who were defendants, adopted the argument of the plaintiffs.

Lyttleton Chubb (*Eve, Q.C.*, with him), for some of the defendant members who were also trustees, left the matter to the decision of the Court.

Sir R. B. Finlay, A.-G., Sir E. H. Carson, S.-G., Ingle Joyce, and *Paley Baildon*, for the Attorney-General. It appears from the wording of the deed of feoffment that the conveyance was made for the promotion of the study of the law—that is, for a charitable purpose. It is the purpose for which the gift is made, not the source from which the funds are derived, which determines the question: *Attorney-General* v. *Eastlake.* (11) It is not necessary to have a charitable trust declared: *In re Christchurch Inclosure Act.* (12)

The contemporaneous accounts of these Inns of Chancery

(1) (1875) 1 Ch. D. 497.
(2) [1896] 2 Ch. 679.
(3) [1896] 2 Ch. 727.
(4) (1853) 11 Hare, 205, 222.
(5) (1745) 3 Atk. 277.
(6) (1860) 2 D. F. & J. 75.
(7) (1871) L. R. 12 Eq. 574.
(8) (1780) 1 Doug. 353.
(9) (1825) 4 B. & C. 855; 28 R. R. 482.
(10) (1836) 5 Ad. & E. 17.
(11) 11 Hare, 221, 222.
(12) (1888) 38 Ch. D. 520, 530.

shew that they were in the nature of colleges in a legal university.

[They referred to and read passages from Waterhous, Fortescutus Illustratus, 1663, p. 526, and Report made to Henry VIII. by Thomas Denton and others circa 1540 (Fortescutus Illustratus, at pp. 543 and 545), describing Moots; Appendix to Stow's Annals, A.D. 1614, pp. 969, 977; Munday's Stow's Survey of London, ed. A.D. 1618, pp. 66; ditto Strype's ed. A.D. 1720, pp. 120, 121, describing the manner in which Moots were carried on; Correspondence between Clifford's Inn and the Inner Temple as to the appointment of readers: Dugdale's Origines Juridiciales, A.D. 1666, pp. 320, 322; Preface to Coke's Reports, Part III. 1826 ed. p. xxxvi.; Minutes of Clifford's Inn, shewing admissions to students' chambers and to moot chambers, of which there appeared to be sixteen in 1632; it also appeared that students' chambers were provided gratis for bonâ fide students during their student's course; that moot chambers were granted for a nominal fine to older members of the Inn, on condition of their assisting in the education of the students by taking part in moots and other exercises of learning; *Rex* v. *Allen* (1); *The Case of Clement's Inn* (2); *Attorney-General* v. *Bowyer*. (3)]

Vernon Smith, Q.C., in reply.

Cur. adv. vult.

June 19. COZENS-HARDY J. This action is brought to determine whether the property known as Clifford's Inn is subject to or affected by any charitable trust, or whether it is held by the trustees in whom the legal estate is vested as private property for the individual members of the Society of Clifford's Inn for their own personal benefit, to be divided and disposed of as they may think fit. At the present time there are sixteen members of the society, and they assert that there is no charitable trust. The Attorney-General alleges that there is. The question for my decision depends on the construction and effect of a conveyance in 1618, but it is necessary, in order to under-

(1) (1834) 5 B. & Ad. 984. (2) (1661) 1 Keb. 135.
(3) (1798) 3 Ves. 714; 4 R. R. 132.

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stand that conveyance, to ascertain as far as may be what was the nature of the Society of Clifford's Inn at that date. Clifford's Inn was one of the old Inns of Chancery, and has been in existence for more than 500 years. It seems that in 18 Edw. 3 (1344) there was a demise from Lady Clifford of the house called Clifford's Inn apprenticiis de banco, which Dugdale thinks means to the lawyers belonging to the Common Pleas. It does not appear under what circumstances or upon what terms this occupation continued, but I think it is clear that, as Dugdale says, Clifford's Inn from that time "continued to be a mansion for the lawyers and called an Inn of Chancery." From very early times Clifford's Inn has been treated as in some sense "belonging to" the Inner Temple, and in *Rex* v. *Allen* (1) Littledale J. recognised this: "No doubt this Court will take notice, in a general way, that the Society of the Inner Temple exercises a jurisdiction over the Inn of Chancery called Clifford's Inn." Sir John Fortescue (1470 temp. Henry VI.) speaks of the Inns of Chancery and the Inns of Court in language applicable only to a legal university: "Here in Term time the students of the law attend in great numbers, as it were to public schools, and are there instructed in all sorts of law learning and in the practice of the Courts. There belong to it ten lesser Inns, and sometimes more, which are called the Inns of Chancery, in each of which there are an hundred students at the least, and in some of them a far greater number, though not constantly residing. The students are for the most part young men. Here they study the nature of original and judicial writs, which are the very first principles of the law. After they have made some progress here and are more advanced in years, they are admitted into the Inns of Court properly so called; of these there are four in number. In that which is the least frequented there are about 200 students." It will be observed that Fortescue speaks of ten Inns of Chancery. By Lord Coke's time they were reduced to eight. He says (3 Rep. pp. xxxv., xxxviii.): "For the young student, which most commonly cometh from one of the Universities, for his entrance or beginning were first instituted and erected eight houses of

(1) 5 B. & Ad. 989.

Chancery, to learn there the elements of the law, that is to say (inter alia) "Clifford's Inn, and each of these houses consists of forty or thereabouts." And, after describing the four Inns of Court and Serjeants' Inn, he adds: "All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others quantum inter viburna cupressus. In which Houses of Court and Chancery, the readings and other exercises of the laws therein continually used are most excellent and behoofful for attaining to the knowledge of these laws." This passage from Lord Coke indicates the state of things existing at the date of the conveyance of 1618. In Stow's Annals, p. 977, which is almost contemporary with the conveyance of 1618, there is the following statement: "I am able to say, by mine own experience, that in these houses of Chancery live and common together attorneys, solicitors, and clerks belonging to the Courts, as well of mere and strict law as of equity and conscience. The chief or governor in every Inn of these Inns of Chancery is called Principal. And in these houses or colleges the tyrones and young gentlemen at their coming up are initiated to make first here an essay and a trial of the study of the Law, which if they like and have a desire to proceed, they remove shortly after to one of the Inns of Court whereunto that house of Chancery belongeth . . . . Every Inn of Court hath two or three Inns of Chancery belonging to it. Twice every year, in Lent and in August, a learned gentleman is chosen out of the rank and degree of Counsellors, to come and hear the motes or disputations and exercises of the young students and to read a law lecture in every of these houses of Chancery, belonging to that Inn of Court from which the Reader hath his mission." Somewhat later—namely, in 1663—was published "Fortescutus Illustratus," by Waterhous, which contains an interesting passage: "These hospitia are either minora, preparatory lodges of freshmen, for none were to be admitted of an Inn of Court but such as first have been in an Inn of Chancery, or majora such as received not the gudgeons and smelts but the polypus's and Leviathans, the Behemoths and the giants of

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the law." He says: "These eight yet in being are still inhabited by young attorneys and students after the manner of the Inns of Court and are accordingly governed and ordered. For they do all of them appertain to some or other of the Inns of Court, and have Readers every year sent from them, who do therein read law to the young students after the likeness of the Inns of Court." I may add that the judges from time to time made orders or regulations for the better governing and regulating of the Inns of Court and of the Inns of Chancery. From these sources it appears to be established that at the date of the conveyance of 1618 the Society of Clifford's Inn was an ancient unincorporated voluntary society, subject in some vague sense to the Inner Temple, and to the jurisdiction of the judges. It was discharging the functions of a college in a legal university.

Whatever may have been the precise legal position of Clifford's Inn as a society, their present title to the buildings known as Clifford's Inn is derived from an indenture of feoffment dated March 29, 1618. [His Lordship then read and stated the material parts of this deed as set out above, and continued:—]

It is worthy of notice that though 600*l.* was paid for the property the deed is something more than a purchase deed. The money consideration is treated as secondary. Other motives prompted the Earl and Lord Clifford to convey the property to trustees. They desired that the name of Clifford should be for ever associated with the property, and that the property should for ever be continued and employed as an Inn of Chancery and not otherwise. A charity may be created by purchase or by statute as well as by gift. The only test is this: Are the purposes for which the property is to be applied public and charitable in the view of the law? See *Attorney-General* v. *Eastlake*. (1) New trustees have from time to time been appointed of the deed of 1618, and in the year 1880 the Duke of Devonshire, in whom the rent-charge of 4*l.* and the reserved set of chambers were vested, in consideration of 850*l.* paid by the Principal and Rules of the society, granted and

(1) 11 Hare, 205.

released the rent-charge and the reserved chambers so as to merge the rent-charge in the inheritance, and to the intent that the chambers should thenceforth be held and enjoyed freed from the right reserved by the deed of 1618; nevertheless, upon the trusts and to and for the uses, intents, and purposes mentioned and declared in the deed of 1618 concerning the other hereditaments thereby granted and released. In the view which I take nothing which has happened since 1618 is very material; but, nevertheless, it is desirable to state shortly the subsequent history of Clifford's Inn. Minute-books of the society, beginning in 1609, have been produced. From these books it appears that three readers were from time to time named by the Inner Temple, one of whom was appointed by the Principal and Rules, and that in some indefinite way a relation was acknowledged to exist between the Society of Clifford's Inn and the Inner Temple. I may refer to an entry in the year 1821: "It is ordered that the Principal do write to the Honourable Society of the Inner Temple, of which Clifford's Inn is a dependency." The readers thus appointed gave readings and took part in moots more or less regularly until about the middle of this century, since which date there has been no attempt at legal education at Clifford's Inn. It further appears from the minutes that there were certain chambers called moot chambers, and that there were other chambers which the Principal was allowed to take the rents of for his own use, and that other chambers were granted for life to individual members. In 1829 an Act was passed for taking down the parish church of St. Dunstan's in the West, which adjoins Clifford's Inn, and building a new church. This Act contained clauses similar to those now found in the Lands Clauses Consolidation Act, and it also contained a special clause: "And whereas it may be expedient to take and use for the purposes of this Act certain chambers belonging to the Society of Clifford's Inn whereby the accommodation of the said society may be abridged. Be it therefore enacted that it shall be lawful to apply the whole or any part of the moneys to be paid for any houses, buildings, lands, tenements, and hereditaments which shall belong to the Society of Clifford's Inn, in or towards

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the building of any houses or chambers in the said Inn, or in improving any of the present buildings or chambers in the Inn, instead of laying the same out in the purchase of other hereditaments, according to the directions hereinbefore contained." A portion of Clifford's Inn was taken under the Act for 5000*l.*, and it appears from the minutes of November 25, 1830, that a doubt had arisen whether the trustees for building the new church should be required to pay over the sum of 5000*l.* to the Principal and Rules, and that a case was submitted to Mr. Preston, whose opinion is set out. He advised that "Clifford's Inn is not a beneficial absolute property in the master and rules. They are subject to a trust for public purposes and cannot, as individual owners might, apply the purchase-money for their own use." The purchase-money was subsequently paid in to the Court of Exchequer, and it was ordered to be paid out in repayment of the cost of building or improving certain houses and chambers in the Inn. I do not regard this Act of 1829, or what was done under it, as of great importance, but some weight should be given to it. If the contention of the present members of Clifford's Inn is well founded, it follows that immediately after the conveyance of 1618 the then members might have sold the property and divided the proceeds. This seems to be wholly inconsistent with the language of the deed and the intent of the parties. Clifford's Inn was to be for ever continued and employed as an Inn of Chancery, i.e., for the furtherance of the study and practice of the laws of England and for the good of the commonwealth. Perpetual user as an Inn of Chancery is the predominant idea. It is true the word "trust" is not found, but that word is not necessary, if upon the fair construction of the whole document it is manifest that a trust or duty or obligation was intended. I think this deed created a charitable foundation, the founders being partly the Earl and Lord Clifford and partly the members who contributed the 600*l.* No doubt the members of the society might derive certain pecuniary benefits or advantages from the property, as the head and Fellows of a college at Oxford or Cambridge then did, and to a less extent still do. But this does not suffice to negative the idea of a charity. It is matter

of public knowledge that the buildings belonging to or occupied by some of the old Inns of Chancery have been dealt with as private property. I do not desire in any way to cast a doubt upon the title of the present owners. It is for those who allege the existence of a charitable trust to establish it. If nothing more is known than that the property was purchased by funds subscribed by members of a voluntary society, such as an Inn of Chancery, or was given by members of the society, if there are no title deeds, or if the title deeds do not suggest a public trust, it may well be that the members for the time being are entitled to say that the property in equity belongs to them, and that there is no trust of a public or charitable nature affecting it. In the case of Clifford's Inn I hold that the conveyance of 1618, under which alone the property is held, negatives the idea of private ownership and proves a dedication to public or charitable purposes. I must, therefore, declare that so much of the property comprised in the deed of 1618 as is now vested in the trustees is subject to a trust for charitable purposes, and I reserve liberty to apply on the footing of this declaration. As a judicial decision was necessary, I think the costs of all parties should be paid by the trustees out of the trust property.

Solicitors: *Routh, Stacey & Castle; George Booth; Clarkson, Greenwells & Co.; Solicitor for the Treasury.*

W. C. D.

COZENS-HARDY J.

1900

July 7.

OVEY *v.* OVEY.

[1874 O. 23.]

Administration—Investment—Lord St. Leonards' Act, 1860 (1) (23 & 24 *Vict. c.* 38), *s.* 10—*Rules of Supreme Court*, 1883, *Order* XXII., *r.* 17.

The Court will not invest trust funds in securities prohibited by the settlor.

In re Wedderburn's Trusts, (1878) 9 Ch. D. 112, not followed.

THIS was a petition, in an action to administer a testator's estate commenced in 1874, for a change of investment of trust funds in court by the sale of New Consols and reinvestment in other securities authorized by Order XXII., r. 17.

The funds included accumulations of income directed by the testator to be invested in 3 per cent. consolidated bank annuities "and no other securities."

Brinton, for the petition. As the funds are being administered by the Court, the securities in which the funds may be invested are defined by Rules of Court made under Lord St. Leonards' Act (23 & 24 Vict. c. 38), s. 10. If the funds were not under the control of the Court, there being an express prohibition by the testator against investment of accumulations in securities other than Consols, the trustees could not have changed the investments of the accumulations, for there are words in s. 1 of the Trustee Act, 1893, similar to the words in the earlier Act of Lord St. Leonards of 1859, excluding investments prohibited by a settlor. In *In re Wedderburn's Trusts* (2) Malins V.-C. held that a trust fund might be invested by trustees under the 11th section of Lord St. Leonards' Act, 1860, in securities authorized by the Act, notwithstanding prohibitive words in the settlement. This could only be the case if the Court could under s. 10 invest in prohibited securities.

(1) The official short title is now the Law of Property Amendment Act, 1860.

(2) 9 Ch. D. 112.

COZENS-HARDY J.

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COZENS-HARDY J. I am not aware whether *In re Wedderburn's Trusts* (1) has been followed. But I must decline to follow it; it would be a strong thing to set aside the express direction of the testator.

Solicitors: *Whitehead, Marshall & Co.*

D. P.

COZENS-HARDY J.

1900

July 12.

In re POWELL. CAMPBELL *v.* CAMPBELL.

[1900 P. 1089.]

Will—Construction—Lapse—Settlement of Shares.

A testatrix gave her real and personal estate to trustees upon trust for sale and conversion, and after payment of debts and legacies, "in trust for my said three daughters in equal shares"; the trustees were then directed to retain the share of each daughter upon trust to pay the income to each daughter for life, to her husband for life, and then for her children in the usual way, and in default of children who should attain a vested interest, in trust for the other daughters in equal shares, but so that the share so accruing should be subject to the same trusts as those declared concerning her original share. One of the daughters having predeceased the testatrix without issue, but leaving a husband:—

Held, that the share of the deceased daughter had not lapsed, and the husband was entitled to receive the income during his life, and subject to this—that it accrued for the benefit of the other daughters, their husbands and children.

In re Pinhorne, [1894] 2 Ch. 276, followed.

In re Roberts, (1885) 30 Ch. D. 234, distinguished.

ADJOURNED SUMMONS.

This was an application by two of the three trustees and executors of the will of Fanny Sophia Powell for the determination of several questions arising in the administration of her estate; but the only question argued that calls for any notice in this report was whether a third share in the residuary real and personal estate, expressed to be settled upon one of the daughters, her husband and children, had lapsed by the death

(1) 9 Ch. D. 112.

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of the daughter in the lifetime of the testatrix. The will, so far as material, was as follows:—

The testatrix, a widow, by her will made in April, 1895, after appointing her three sons-in-law executors and trustees, devised to them her dwelling-house in High Street and her stables in Hill Lane, Haverfordwest, and all other her real estate (except that situate in Ireland) upon trust to sell the same, and apply the net proceeds as part of her personal estate; and after certain specific and pecuniary legacies, including one of 1000*l.* to her daughter Georgina Coleridge Campbell, the testatrix bequeathed to her trustees the residue of her personal estate upon trust to sell and convert the same into money, and pay thereout her debts, funeral and testamentary expenses, and legacies, and to stand possessed of the surplus (thereinafter referred to as "my residuary estate") "in trust for my said three daughters in equal shares. I direct that my trustees shall retain the legacy of 1000*l.* hereinbefore bequeathed to the said Georgina Coleridge Campbell and the share of her and each of my other daughters in my residuary estate, and stand possessed thereof upon the trusts following (that is to say), upon trust to invest the same and pay the income thereof to my same daughter during her life, for her separate use, and after her death to pay such income to her present husband, if he survive her during his life, or until he marry again, and after his death or second marriage, to hold the capital in trust for her children" in such manner as the daughter should by deed or will appoint, and in default of appointment for sons at twenty-one, or daughters at twenty-one or marriage, in equal shares, and in default of children of a daughter who should attain a vested interest, "In trust for my other daughters in equal shares, but so that the share accruing to each under this clause shall be subject to the same trusts as those hereby declared concerning her original share."

Cecilia Phillips Cope, one of the testatrix's three daughters, died in September, 1897, without issue, leaving her husband surviving her.

The testatrix died in May, 1900, and her will was proved by all three executors. The present summons was taken out by

two of the executors and trustees against the two surviving daughters, one of their children, and the remaining executor and trustee, for the determination (inter alia) of the question whether the one-third share in the residuary estate bequeathed to Cecilia Phillips Cope and directed to be retained by the trustees upon the trusts by the will declared was under the circumstances effectually disposed of by the will, or whether it had lapsed and devolved as upon an intestacy.

J. G. Wood, for the trustees.

G. R. Northcote, for the surviving daughters. The will contains an absolute gift of one third share to each daughter, followed by a direction to the trustees to retain the share of each daughter upon certain trusts; the daughter Cecilia never lived to take any share: therefore the settlement did not take effect, and this share has lapsed and passes to the surviving daughters as next of kin; the case is exactly covered by *In re Roberts*. (1)

L. F. Potts, for the husband of the deceased daughter. This is only a notional division into thirds for convenience of drafting. The intention of the testatrix is plain; reading the gift as a whole, the effect of the will is to give a life interest only to each daughter, with a settlement on her husband and children after her death: the death of the daughter in the lifetime of the testatrix makes no difference. *In re Pinhorne* (2) is exactly in point; *In re Roberts* (1) is distinguishable, because it was to be a settlement of the share which the niece took, not a settlement of one-fourth. Reading the will in this way, which is the reasonable way, there is no lapse; the surviving husband is, therefore, entitled to the income of this third share for his life.

Hatfield Green, for the infant children, adopted this argument. Subject to the husband's life interest, this share goes under the accruer clause for the benefit of the other daughters and their children.

Northcote, in reply. In both *In re Roberts* (1) and *In re Pinhorne* (2) the direction to the trustees was "to retain" the

(1) 30 Ch. D. 234. (2) [1894] 2 Ch. 276.

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share already given. *In re Roberts* (1), being a decision of the Court of Appeal, is binding on this Court, and should be followed.

COZENS-HARDY J. Reading this will apart from authority, I think it is pretty plain that the testatrix intended that each of her daughters should take a life interest, and a life interest only, in one-third of this residuary estate. This construction is borne out by the fact that the division into thirds does not stand alone, because the testatrix immediately goes on to direct her trustees to retain the share of each daughter, and stand possessed of it upon trust to pay the income only to each daughter for life, to her husband for life, and then to hold the capital for the benefit of her children. I think the testatrix has expressed her intentions quite clearly, and has made a good disposition of a life interest to each daughter, a life interest to each husband, with remainder to their respective children in the usual way, with an accruer in default of any child of a daughter to take a vested interest. If that be the true construction of this will, the death of one of the daughters in the lifetime of the mother has no other effect than to accelerate the life interest of the surviving husband. Apart from authority, I think I am able to come to this conclusion.

Am I precluded from deciding in this way by either of the authorities which have been cited to me? I think not. In *In re Pinhorne* (2) Chitty J. pointed out that in *In re Roberts* (1) the gift to the nephews and nieces named was followed by a provision that in case any of them should die under twenty-one, his or her share, whether original or accruing, should go to the others of them; so that if a niece had died under twenty-one leaving children, the children could not have taken; or, as Lindley L.J. put it (3): "You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes." There is no provision of that kind in the will before me; indeed, the present case is much more like *In re Pinhorne* (2), so that in the result I am assisted by that decision

(1) 30 Ch. D. 234. (2) [1894] 2 Ch. 276.
(3) 30 Ch. D. 238.

in distinguishing the present case from *In re Roberts* (1), and, as far as the authorities go, I am therefore at liberty to come to the conclusion that the share of this deceased daughter has not lapsed, but was duly settled. The husband is, therefore, entitled to receive the income of this third share for his life, and subject to this it will accrue for the benefit of the other daughters, their husbands and children, upon the trusts declared of their original shares.

Solicitors: *Peacock & Goddard, for Eaton Evans & Williams, Haverfordwest; Philpot & Son, for H. A. Cope, Holywell.*

W. C. D.

In re DE POTHONIER. DENT *v.* DE POTHONIER.

[1900 D. 883.]

Trustees — Investment — Convertible Securities — Bearer Bonds — Custody — Bankers.

Where trustees are expressly authorized to retain or invest in convertible securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment by the bankers of the receipt thereof.

Field v. *Field*, [1894] 1 Ch. 425, distinguished.

ADJOURNED SUMMONS.

This was an application by three of the trustees of the will of C. G. S. de Pothonier for directions as to the safe custody and control of bonds and debentures transferable by delivery and held by them on the trusts of the said will.

The testator, who died in December, 1899, after appointing his wife and the three plaintiffs executors and trustees, and giving numerous specific and pecuniary legacies, gave the residue of his real and personal estate to his trustees "upon trust to realize and convert the same into money with such powers and discretions as if they were absolute owners thereof,

(1) 30 Ch. D. 234.

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and with power to continue all investments made by me, and generally to manage and deal with my estate and the realization and postponement of realization thereof as they in their absolute discretion may think fit"; the residuary estate was then settled upon trust for the benefit of the testator's wife for her life or widowhood, his only daughter for her life, with remainder to her children or issue. The will also contained the following clause: "As regards all moneys subject to investment under my will my trustees are to have full power to continue all investments made by me whether of a nature authorized for investment or not without incurring any responsibility."

A large portion of the estate of the testator was at the time of his death invested in bonds of American railroads payable to bearer with coupons for dividends attached; it was considered desirable, as the trustees were expressly authorized so to do, to retain about 50,000*l.* worth of these investments, and the trustees proposed to deposit these and other bearer bonds with the Union Bank of London, Limited, with whom it was intended to keep the banking account of the trust estate, but, having regard to the judgment in *Field* v. *Field* (1) as to the duty of trustees holding bonds and certificates payable to bearer, the present summons was taken out. The widow and the infant daughter were defendants.

Affidavits by two well-known bank managers, as to the practice prevailing in the City of London amongst bankers and their customers with regard to the custody of bonds of foreign governments or of railroad or other companies payable to bearer, were filed, which stated as follows:—

"It is a common practice of investors to deposit such bonds with their bankers upon a simple acknowledgment by the bankers of the receipt thereof. In such cases the bankers accept the deposit subject to such responsibility as is imposed upon them by law for their safe custody, and they collect the coupons for their customers, and credit them to the account of the customers, as and when received. From my own knowledge of the course of business in the City, I say that it is a

(1) [1894] 1 Ch. 430.

very common practice amongst men of business, and joint stock companies who hold large quantities of bonds, to deposit them with their bankers upon the above terms, and I believe that such practice offers to the owner of the bonds as good a security for the safe and proper custody of such bonds as can be obtained, and is at the same time the most convenient course the bond-holder can adopt as regards the collection of interest on the bonds. If bonds to bearer are deposited with bankers in a locked box or other closed receptacle, the bankers do not give any receipt for the bonds, but only a general acknowledgment of receipt of the box, and decline to accept any responsibility for its contents."

Clauson, for the plaintiffs. After the observations at the end of the judgment in *Field* v. *Field* (1), the trustees felt some difficulty in deciding whether they were justified in depositing the bonds with a bank, as a mere agent; the bankers would be only gratuitous bailees—*Giblin* v. *McMullen* (2)—and would not be bound to exercise more than the ordinary care, and would only be liable for loss through negligence: *Johnston's Claim*. (3) In *Mendes* v. *Guedalla* (4) trustees were allowed to deposit bonds of this kind in a box at a banker's on account of all the trustees, one being allowed to keep the key in order to obtain the coupons: this, of course, is very inconvenient; besides, the evidence shews that the trustees really get a better security by delivering the bonds direct to the bankers than by placing them in a box for custody with them, in which case a receipt for the box only is given. The former course seems to be the usual one adopted by business men. Trustees are only bound to exercise the same care that a prudent man of business would use with securities of this class.

[Lewin on Trusts, 10th ed. p. 317, and Grant's Law of Banking, 5th ed. p. 189, were also referred to.]

Whinney, for the testator's infant daughter, raised no objection, and left the matter to the Court.

(1) [1894] 1 Ch. 430.
(2) (1868) L. R. 2 P. C. 317.
(3) (1871) L. R. 6 Ch. 212.
(4) (1862) 2 J. & H. 259.

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COZENS-HARDY J. The law does not impose upon trustees more than the exercise of that ordinary care and diligence which a competent and prudent man of business would exercise in his own affairs: that is settled by *Speight* v. *Gaunt.* (1)

Now here the testator has done that which, speaking for myself, I think an extremely imprudent thing. He has authorized the retention of bearer securities, and one of the trusts of the will is to deal with these bearer securities, which are securities with coupons attached which have to be cut off at regular periods. It is idle and ridiculous to say that securities of that nature must be kept in a box with four keys, not to be opened to cut off the coupons except when all four trustees are present together. That is not a businesslike transaction in a matter of this kind. I think the trustees are perfectly justified in dealing with American bonds and securities of this nature in the way which is customary among prudent men of business. As I understand, the trustees have a current trust account with their bank. The bankers are well-known bankers. It is the ordinary usage of bankers, with whom bonds of this nature are deposited, to discharge the duty of cutting off the coupons when due, collecting them, and placing the amount to the credit of the customer's account. I think the trustees would be perfectly justified in depositing the bonds with the bankers upon those terms, which will not justify the bankers in parting with the bonds except under the authority of all the trustees, but will justify the bankers in cutting off the coupons and collecting them as and when they are due, in the ordinary course. This seems to be entirely in the spirit of, if not sanctioned by the express language of, Wood V.-C. in *Mendes* v. *Guedalla* (2), and I do not think that Kekewich J. in *Field* v. *Field* (3) really intended to depart from that. I observe that *Mendes* v. *Guedalla* (2) was not cited to Kekewich J., and he was directing his mind to the question whether trustees ought to allow bonds of this nature to remain in the hands of a solicitor. That I should unhesitatingly answer in the negative. It is no part of a solicitor's duty to cut off these

(1) (1883) 9 App. Cas. 1. (2) 2 J. & H. 259.
(3) [1894] 1 Ch. 430.

coupons and collect them, while it is part of the duty of the banker. My judgment is that it is part of the duty which he undertakes for his customer. The order should, I think, be in this form: The plaintiffs and the defendant Mrs. de Pothonier may be authorized to deliver the bonds and debentures to the Union Bank of London, Limited, to be deposited in their joint names, for safe custody and for the collection of coupons so long as the bank acts as the bankers of the trustees.

Solicitors: *Linklater & Co.*

W. C. D.

BUCKLEY J.

1900

June 28, 29; *July* 3.

BUCKLAND *v.* BUCKLAND.

[1900 B. 1382.]

Married Woman—Separate Estate—Settlement by Infant—Subsequent Repudiation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 2, 19—*Construction—Recital of Agreement—Implied Covenant.*

The principle stated in *Hancock* v. *Hancock*, (1888) 38 Ch. D. 78—namely, that s. 19 of the Married Women's Property Act, 1882, prevents s. 5 of that Act from interfering with any settlement which would have bound the property if the Act had not been passed—applies also to s. 2 and to settlements by which the wife is not bound.

Stevens v. *Trevor-Garrick*, [1893] 2 Ch. 307, followed.

An ante-nuptial settlement made between the intended husband, the intended wife (an infant), and trustees recited an agreement that property belonging to the wife and then in the hands of the trustees should be settled. By the testatum the wife, in pursuance of the agreement, declared that the trustees should hold the property on certain trusts. There was no declaration or covenant by the husband. On attaining twenty-one the wife repudiated the settlement:—

Held, that there was an agreement between the husband and the trustees, and that the recital of that agreement was operative as between the parties to it, although unaccompanied by any obligation binding on the infant wife. The husband's marital right was affected by the agreement; there was, therefore, a settlement which would have bound the property if the Married Women's Property Act, 1882, had not been passed, and the wife was not entitled to have the trust funds transferred to her as her separate estate.

THE plaintiffs were Mr. and Mrs. Buckland, and they brought this action to set aside their marriage settlement. At the date of the settlement Mrs. Buckland, then Miss Jeanette E. Cockle, was an infant of the age of eighteen years, and entitled under the will of her father James Cockle, who died in 1875, to a legacy of 1000*l.* This legacy was not given to her for her separate use; but the trustees were directed to invest it and apply the income for her maintenance till twenty-one or marriage. The settlement was dated December 8, 1891, and was made between Jeanette E. Cockle of the first part, Felix Buckland of the second part, and H. F. Cockle and J. E. Blackett of the third part. It recited the will of James Cockle, and that H. F. Cockle and J. E. Blackett were executors and

trustees of that will; that Jeanette E. Cockle was then of the age of eighteen years or thereabouts, and that a marriage was intended to be solemnized between her and Felix Buckland, and continued as follows: "And whereas upon the treaty for the said intended marriage it was agreed that the said legacy and the investments representing the same . . . . should be settled upon the trusts and subject to the powers and provisions hereinafter declared, now this indenture witnesseth that, in pursuance of the said agreement and in consideration of the said intended marriage, the said Jeanette E. Cockle, with the privity and approbation of the said Felix Buckland, doth hereby declare that the said H. F. Cockle and J. E. Blackett, or other the trustees or trustee for the time being of the said will . . . . shall stand possessed of the said legacy . . . . upon trust after the solemnization of the said intended marriage to pay the income thereof to the said Jeanette E. Cockle during her life for her separate use without power of anticipation," and after her death that the trustees should stand possessed of the said trust premises and the income thereof in trust for the children of the marriage as Jeanette E. Cockle should appoint, and in default of appointment for all the children who being sons attained twenty-one, or being daughters attained that age or married; and if there should be no children upon trust for such persons as the said J. E. Cockle should appoint; and in default of appointment, if Jeanette E. Cockle survived Felix Buckland, in trust for her, her executors, administrators, and assigns, and so that she should not during the said intended coverture have power to anticipate the same; but if he should survive her, then in trust for such persons as would have become entitled thereto had she died intestate and without having been married.

The marriage took place, and two children were born in 1892 and 1894 respectively. The trustees paid the income to Mrs. Buckland till she attained twenty-one in 1894, whereupon she at once repudiated the settlement, and claimed that the trust funds should be transferred to her. She and her husband brought this action against their infant children and the trustees, asking for a declaration that the settlement was not

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binding on them or either of them, and that the trustees might be ordered to transfer the trust property to Mrs. Buckland on her separate receipt.

T. H. Attwater, for the plaintiffs. The legacy belongs to Mrs. Buckland for her separate use under s. 2 of the Married Women's Property Act, 1882. Sect. 19 of that Act merely says that the construction of the settlement is not to be affected, and it does not apply unless there is a settlement in which the wife has concurred: Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. pp. 286, 287. Here Mrs. Buckland has repudiated the settlement, and it is gone as if it had never existed.

[BUCKLEY J. Under *Stevens* v. *Trevor-Garrick* (1), which followed *Hancock* v. *Hancock* (2), it must be assumed that the effect of s. 19 is that s. 2 must be treated as non-existent in every case where there is a settlement which would have bound the property if the Act had not been passed. If there was no s. 2, this legacy would on the marriage have vested in the husband if he had not joined in the settlement. He executed the settlement. Why is not the property bound by it?]

Hancock v. *Hancock* (2) only applies to settlements by women of full age and binding on them, and ought not to have been extended to settlements by infants, as was done by Chitty J. in *Stevens* v. *Trevor-Garrick*. (1) His Lordship's former decision in *In re Queade's Trusts* (3) was right. But in *Stevens* v. *Trevor-Garrick* (1) there was an assignment of the funds by the husband and wife, and it does not apply to this settlement, which contains nothing more than a recital of an agreement.

The settlement is gone altogether. Mrs. Buckland has repudiated it so far as she is concerned; it must be treated as if it had never existed. Mr. Buckland also is not bound by it. He executed it only in order to give his consent to its execution by Mrs. Buckland. He made no grant or declaration or covenant. It was a tripartite agreement between him, his wife, and the trustees, not a separate agreement between him and

(1) [1893] 2 Ch. 307.
(2) 38 Ch. D. 78.
(3) (1884–5) 54 L. J. (Ch.) 786; 33 W. R. 816.

the trustees. She declared the trusts in consideration of "the said agreement"; so it must have been her agreement. The tripartite agreement is void because one of the parties has avoided it; therefore there is no agreement by him to settle his wife's property, and there is no settlement at all.

[BUCKLEY J. There was an agreement by him for value to settle property which, but for the Act, would have come to him. He might have reduced this legacy into possession and spent it. It is immaterial whether the wife agreed or not: *Hancock* v. *Hancock*. (1)]

In that case the wife was not an infant. Here there was no agreement by the husband to anything except that the wife should settle; and she has not settled. The property is, therefore, hers for her separate use under s. 2.

A. St. J. Clerke, for the defendants. Covenants to settle after-acquired property of the wife are within s. 19: *In re Stonor's Trusts* (2); *In re Whitaker*. (3) These cases were followed by *Hancock* v. *Hancock* (1) and *Stevens* v. *Trevor-Garrick* (4); and the rule is now settled that s. 19 applies to such a case as this, and that the Court considers "interfere with or affect any settlement" in s. 19 as equivalent to "hinder or prevent any property from becoming subject to a settlement which would have been subject to it if the Act had not been passed." Therefore the Act must be treated as non-existent, and the question is what property was bound by this settlement. This legacy is still in the hands of the trustees of the settlement; Mr. Buckland has not reduced it into possession, and cannot do so, as that would be an act inconsistent with the settlement: *Milner* v. *Lord Harewood* (5); *Pimm* v. *Insall*. (6) There was a settlement by Mr. Buckland. The recital of the agreement that the legacy should be settled will, in the absence of any reference to it in the operative part, be read as an express covenant by him: *Young* v. *Smith* (7); *Dawes* v. *Tredwell*. (8)

(1) 38 Ch. D. 78.
(2) (1883) 24 Ch. D. 195.
(3) (1887) 34 Ch. D. 227.
(4) [1893] 2 Ch. 307.
(5) (1811) 18 Ves. 259.
(6) (1848) 7 Hare, 193.
(7) (1865) L. R. 1 Eq. 180.
(8) (1881) 18 Ch. D. 354.

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T. H. Attwater, in reply. There was no question of infancy in *In re Stonor's Trusts* (1) or *In re Whitaker*. (2) The infancy of the wife and her repudiation of the settlement are the distinguishing features of this case. The result of her action is that there is no settlement.

In s. 19 the words, "interfere with or affect any settlement" mean "invalidate or render inoperative any settlement": *In re Armstrong* (3); *In re Lumley*. (4) There must be a settlement valid and operative against the wife in order to deprive her of her separate property under the Act.

Cur. adv. vult.

July 3. BUCKLEY J. In *In re Queade's Trusts* (5), the settlement was a post-nuptial settlement made in the year 1847 between the wife, who was an infant, the husband, and the trustees. It contained an agreement and declaration by the parties and a covenant by the husband that all future property of the wife should be settled. In 1883—that is to say, after the passing of the Married Women's Property Act, 1882—the wife became entitled as one of the next of kin to a share of undisposed-of residuary estate. There, as here, the wife was at the date of the deed an infant, and there was, therefore, no settlement by her. Chitty J. held that s. 5 of the Act of 1882 was operative in those circumstances, and that the wife was entitled.

In *Hancock* v. *Hancock* (6) that case was disapproved. The Court of Appeal held that, according to its true construction, the 19th section of the Act of 1882 prevents s. 5 from interfering with any settlement which would have bound the property if the Act had not been passed. The argument that "settlement" in s. 19 must mean "settlement which is binding upon the wife" was advanced and failed. The settlement in that case did not contain any covenant by the wife or any joint declaration or agreement. Subsequently in *Stevens* v. *Trevor-Garrick* (7) Chitty J. held that in a case where, not s. 5 of the

(1) 24 Ch. D. 195.
(2) 34 Ch. D. 227.
(3) (1888) 21 Q. B. D. 264, 270.
(4) [1896] 2 Ch. 690.
(5) 54 L. J. (Ch.) 786; 33 W. R. 816.
(6) 38 Ch. D. 78.
(7) [1893] 2 Ch. 307.

Act but s. 2 was the relevant section, the principle of the decision of the Court of Appeal was equally applicable.

In this state of things it appears to me that the decision in *In re Queade's Trusts* (1) is gone altogether, and that it cannot be maintained, as was argued before me, that the effect of s. 19 is merely to provide that the construction of the settlement is not to be affected, and that the Act does not apply except where the wife is bound by or has assented to the settlement.

I conceive that I must deal with the present case upon the footing that s. 2 is not to interfere with the settlement if it be a settlement which would have bound the property if the Act of 1882 had not been passed.

What, then, would have been the effect of the settlement of December 8, 1891, if the Married Women's Property Act of 1882 had not been passed? At the date of the marriage in December, 1891, the lady was entitled to a legacy of 1000*l.* under the will of her father, who had died in 1875. It was not given for her separate use. It was, therefore, a sum to which the husband would after the marriage have been entitled by virtue of his marital right upon reducing it into possession. In that state of things a deed was executed to which the lady (then an infant), the intended husband, and certain trustees are parties. It recites the will under which the legacy is given and the death of the testator, and recites that the lady is an infant of the age of eighteen years or thereabouts, and then recites that upon the treaty for the marriage it was agreed that the legacy should be settled upon the trusts after declared. The testatum is that, in pursuance of the said agreement and in consideration of the said intended marriage, the lady, with the privity and approbation of the intended husband, declares that the trustees of the will shall stand possessed of the legacy upon certain trusts. Now, seeing that the lady was at this date an infant, the recited agreement cannot have been with her. It must have been an agreement between the intended husband and the trustees for the beneficiaries, including the children of the marriage, if there should be such. In pursuance, therefore, of this agreement between the intended husband

(1) 54 L. J. (Ch.) 786; 33 W. R. 816.

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and the trustees, the intended wife, with the privity of the intended husband, declares that the legacy shall be held upon certain trusts. As a declaration by the infant, this of course had no effect at all; so that unless the recital of the agreement is to be operative as between the parties who are recited to have agreed, the instrument will have been wholly inoperative as to the property purporting to be settled. The case, therefore, seems to me to be parallel with that of *Holles* v. *Carr* (1), referred to by Lord Romilly in *Young* v. *Smith*. (2) There is a plain recital of an agreement that the legacy shall be settled upon trusts which are in the instrument after declared, and no subsequent operative part to give effect to that agreement, unless it be found in implying an agreement or covenant on the part of the husband to do such things as are necessary to give effect to the settlement which the infant purports to make with his privity and approbation. Under these circumstances, it appears to me that there is in this instrument an agreement by the husband which binds the marital right, which is his upon the footing that the Married Women's Property Act, 1882, has not been passed. In other words, I think that, as in *Hancock* v. *Hancock* (3), the agreement by the husband to settle, although unaccompanied by any obligation binding the infant wife, is an agreement which would have bound the property if the Act of 1882 had not been passed, and that upon the true construction of that Act s. 19 prevents s. 2 from interfering with it. I may add that as a matter of fact it is plain from the evidence which was given before me that the guardian of the lady, who was one of the trustees, stipulated for the execution of the settlement as a condition of approving the marriage, and that there was in fact an agreement as between the husband and Mr. Henry Frederick Cockle, the trustee, that the property should be settled, as appears by the instrument of December 8, 1891. Under these circumstances the action fails, and must be dismissed.

Solicitor: *Charles H. Dodd.*

(1) (1676) 2 Freem. 3; 3 Swans. 638. (2) L. R. 1 Eq. 180.
(3) 38 Ch. D. 78.

H. C. R.

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[1899 F. 9666.]

Will—Trust to Accumulate Income beyond Twenty-one Years—Intestacy—Thellusson Act (1) (39 & 40 *Geo.* 3, *c.* 98).

A testator devised and bequeathed his estate and effects to trustees, upon trust to pay out of the income thereof an annuity of 200*l.* to his niece during her life, and he directed that the surplus income of his trust estate should accumulate and be invested until the death of his niece, and, subject and without prejudice to the trusts aforesaid, his trust estate should be held in trust for the children of his niece living at his decease, or born afterwards, who should attain twenty-one, or who dying under that age should leave issue living at his or her decease, if more than one in equal shares; and in case there should be no such issue of the niece then, subject and without prejudice to the trusts aforesaid, after her death and the failure of her issue, as to one-third of his trust estate the same should be held in trust for some cousins named in the will, and as to the other two-thirds the same should be held in trust for the trustees of a charity:—

Held, that as to the surplus income from the expiration of twenty-one years after the testator's death down to the death of the niece there was an intestacy.

Weatherall v. *Thornburgh*, (1878) 8 Ch. D. 261, is not inconsistent with and has not been overruled by *Wharton* v. *Masterman*, [1895] A. C. 186.

Held also, on the construction of the will, that the persons who should become on the death of the niece entitled to the trust fund would become entitled also to the accumulations of the surplus income during the period of twenty-one years from the death of the testator.

APPEAL against a decision of the Vice-Chancellor of the County Palatine of Lancaster.

Joseph Travis by his will, dated November 5, 1877, appointed executors and trustees, and bequeathed some pecuniary legacies, and, subject as aforesaid, he gave, devised, and bequeathed "all and every my estate and effects unto and to the use of my trustees, their heirs, executors, administrators, and assigns, for all my estate and interest therein, upon the trusts hereinafter declared concerning the same, viz., upon trust to pay out of the clear income of my trust estate unto my housekeeper Nanny Lees during her life the weekly sum of 30*s.*, for her

(1) The official short title is now The Accumulations Act, 1800.

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separate use without power of anticipation, and subject thereto upon trust to pay the clear income of my trust estate unto my brother E. C. Travis and his assigns during his life, and from and after the decease of my brother I direct that my trustees shall hold my trust estate upon trust to pay out of the clear income thereof an annuity of 200*l.* to my niece Kate Cheetham, the wife of William H. Cheetham, and daughter of my brother E. C. Travis, during her life, for her separate use without power of anticipation. And I direct that the surplus income of my trust estate shall accumulate and be invested until the death of my said niece, and subject and without prejudice to the trusts and provisions aforesaid my trust estate shall be held upon trust for all and every the children or child of my said niece living at my decease, or born afterwards, who shall attain the age of twenty-one years, or who dying under that age shall leave issue living at his or her decease, to be divided between or amongst such children, if more than one, in equal shares as tenants in common, and their, his, or her heirs, executors, administrators, and assigns respectively; and in case there shall be no child of my said niece who shall attain twenty-one, or who dying under that age shall leave issue living at his or her decease, then, subject and without prejudice to the trusts and provisions aforesaid, my trust estate shall, after the death of the survivor of my said brother and niece, and the failure of issue of my said niece as aforesaid, be held upon trust to raise out of my trust estate 300*l.*, and pay the same to Sarah Beckett, widow of my cousin John Beckett. As to one-third part of my trust estate the same shall be held upon trust for my seven cousins (named in the will), children of my late uncle John Travis, in equal shares as tenants in common, and their, his, or her heirs, executors, administrators, and assigns. And as to the remaining two-third parts of my trust estate the same shall be held upon trust for the trustees for the time being of the Oldham Blue Coat School, to be applied to the purposes of that institution."

The testator died on December 10, 1877. At the time of his death his brother E. C. Travis was his heir-at-law and his sole next of kin. E. C. Travis died on April 13, 1878, having

by his will devised and bequeathed to trustees all his estate and effects both real and personal, upon the trusts therein declared, under which his daughter Kate Cheetham took an interest.

On May 12, 1880, Nanny Lees married Joseph Frost, who subsequently died.

On April 29, 1884, Kate Cheetham, being then a widow, married Joseph Robert Greatorex. In 1899 she was fifty-four years of age, and had never had any children.

The annuities bequeathed by the will of Joseph Travis to Nanny Frost and Kate Greatorex had been duly paid.

The residue of the income arising from the testator's trust estate, after the payment thereout of the two annuities, had since the death of E. C. Travis been accumulated in accordance with the direction contained in the testator's will, and on December 10, 1898, the accumulations amounted to 12,848*l.* 17*s.* 5*d.* On that day the period during which the income could be lawfully accumulated expired.

This petition was presented by Nanny Frost and J. R. Greatorex, the present trustees of the testator's will; the defendants being Kate Greatorex; the trustees of the will of E. C. Travis; John Travis, who was appointed to represent the testator's cousins named in his will; and the trustees of the Oldham Blue Coat School.

The petition asked for the determination by the Court of the following questions:—

(1.) Who were entitled to the sum of 12,848*l.* 17*s.* 5*d.*, and for what estates and interests.

(2.) Who were entitled to the surplus income of the trust estate as from December 10, 1898, and in what shares and proportions, and how the petitioners should deal with that surplus income.

S. Hall, Q.C., V.-C. made a declaration that the trusts for accumulation of the surplus income of the testator's residuary estate ceased upon December 10, 1898, that being the expiration of twenty-one years from the testator's death; and that the surplus income of the trust estate (including in the trust estate the sum of 12,848*l.* 17*s.* 5*d.*) from December 10, 1898, down to the death of Kate Greatorex was not effectually disposed of

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by the will, and was during that period payable to the trustees for the time being of the will of E. C. Travis.

The Vice-Chancellor also held that the 12,848*l.* 17*s.* 5*d.* would belong to the persons who ultimately should become entitled to the trust estate on the death of Kate Greatorex.

The trustees of the Oldham Blue Coat School and the testator's cousins appealed, and the representatives of E. C. Travis served a cross-notice of appeal.

Levett, Q.C., and *Clarkson*, for the trustees of the school. The effect of the Thellusson Act is to insert into the direction to accumulate the words, "for the period of twenty-one years from my death." But for that Act there would be no intestacy. The direction to accumulate beyond the period of twenty-one years must be treated as struck out of the will, and then, "subject and without prejudice to the trusts and provisions aforesaid," i.e., so far as they are legal, and to the payment of the 300*l.* to Sarah Beckett, two-thirds of the trust estate are given to the trustees of the schools, in the event of Kate Greatorex leaving no issue. She should be treated now as past the age of childbearing, and, subject to the payment of the annuities, two-thirds of the trust funds and of the accumulations and the income of the investments should be handed over to the trustees of the schools. *Saunders* v. *Vautier* (1) applies. The cases on which the Vice-Chancellor relied, namely, *Talbot* v. *Jevers* (2) and *Weatherall* v. *Thornburgh* (3), either do not apply, or they are inconsistent with the decision of the House of Lords in *Wharton* v. *Masterman*. (4)

That the Court will act on the assumption that a woman is past the age of childbearing is shewn by *In re Lowman* (5); *In re Hocking*. (6)

Warrington, Q.C., and *Maberly*, for the representatives of E. C. Travis. The gifts to the trustees of the school and the cousins of the testator are contingent upon the death of

(1) (1841) 4 Beav. 115; Cr. & Ph. 240.
(2) (1875) L. R. 20 Eq. 255.
(3) 8 Ch. D. 261.
(4) [1895] A. C. 186.
(5) [1895] 2 Ch. 348.
(6) [1898] 2 Ch. 567.

the annuitant without children. The Court will not act on the assumption that a woman cannot have children for the purpose of altering rights, but only for the purpose of administration: *In re Hocking.* (1) There is no presumption of law that a woman at any age cannot have children.

There is here clearly an intestacy as to the surplus income during the period from the expiration of the twenty-one years until the death of the annuitant. *Wharton* v. *Masterman* (2) has no application, and it did not overrule *Weatherall* v. *Thornburgh.* (3) In *Wharton* v. *Masterman* (2) the direction for accumulation was ineffectual independently of the Thellusson Act. There was no effective trust for accumulation. In the present case, by reason of the Act, there is no gift of any surplus income between the expiration of the twenty-one years and the death of the annuitant. Nothing is given to the trustees of the school or the testator's cousins until after the death of the annuitant. If there is an illegal direction for accumulation, the effect of the Act is to strike that out of the will, but in all other respects the will remains unaltered: *Eyre* v. *Marsden.* (4)

As to the cross-appeal, the words of the will do not carry the accumulations during the twenty-one years to the persons ultimately entitled to the trust estate. It is only the original "trust estate" which is given to them; they take no interest in the accumulations.

Astbury, Q.C., and *Norris*, for Kate Greatorex, referred to *M'Donald* v. *Bryce* (5); *In re Dawson.* (6)

As to the cross-appeal, as a general rule the income would go with the corpus. The question is, whether there is not language in this will which excludes that rule: *Countess of Bective* v. *Hodgson.* (7)

Grant, for the testator's cousins.

J. A. Tweedale, for the executors and trustees of the testator.

Levett, Q.C., in reply. Unless the "trust estate" means the

(1) [1898] 2 Ch. 567.
(2) [1895] A. C. 186.
(3) 8 Ch. D. 261.
(4) (1838) 2 Keen, 564, 574.
(5) (1838) 2 Keen, 276; 44 R. R. 254.
(6) (1888) 39 Ch. D. 155.
(7) (1864) 10 H. L. C. 656.

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trust estate for the time being and includes the accumulations, the testator would have directed the income to be accumulated for no purpose.

In *Eyre* v. *Marsden* (1) there was no gift of the illegal accumulations. In the present case there is a gift of the whole of the accumulations to the remaindermen.

Cur. adv. vult.

July 10. LORD ALVERSTONE M.R. This appeal raises two questions, the first being an important one of general principle, and the second one which turns upon the construction of the particular will. [His Lordship stated the provisions of the will, and continued:—]

It has been argued that Kate Greatorex has reached an age at which the Court will assume that there is no possibility of her having issue. Under these circumstances the question arises, Who are the persons now entitled to the income of the trust funds during her life? It is not denied that the Thellusson Act applies, so that the direction to accumulate beyond the period of twenty-one years from the death of the testator cannot operate. The first question relates to the surplus income between the expiration of the twenty-one years on December 10, 1898, and the death of Kate Greatorex. The second question, which is raised by the cross-appeal, relates to the accumulations during the twenty-one years. In my opinion the judgment of the Vice-Chancellor is right upon both points.

The question may, I think, be stated in this way: Is there a gift to the charity and to the testator's cousins of all the surplus income, or is there a period during which no gift of that income is made? Is there a gap between the expiration of the twenty-one years and the death of the niece during which the intention (as expressed in the will) to give the surplus income to the persons ultimately entitled cannot take effect?

I think that upon this point the case is practically governed by the decision of this Court in *Weatherall* v. *Thornburgh*. (2) The facts were not exactly the same as in the present case; but

(1) 2 Keen, 564. (2) 8 Ch. D. 261.

the principle was there laid down by James L.J. In that case a testator had directed the surplus income of his personal estate (after paying an annuity) to be accumulated for a period exceeding the legal period, and the question was whether Thomas Messiter, to whom the accumulations were given after the death of the annuitant, was entitled to the accumulations after the expiration of the period of twenty-one years from the death of the testator. James L.J. said (1): "The testator directs that the capital and the accumulations shall not be divided till the death of his wife" (the annuitant) "so that if he made no distribution of the surplus income of the twenty-one years, and his wife was still alive, there would have been a gap as to the intermediate income till the death of his wife. Who, then, would be entitled to that income? I am of opinion that Thomas Messiter is not the residuary legatee under the will; he is only residuary cestui que trust in remainder after the death of the wife of the particular fund, and there is nothing in the Thellusson Act to give the accumulations to him. There is no gift of the surplus income to any person whatever until the death of the wife. The testator has divided the enjoyment of his property into two parts, something to be enjoyed before and something to be enjoyed after the death of his wife. Accumulations which fail under the Thellusson Act must be treated in the same way as a gift which fails under the Mortmain Act. It has never been held that property that is set free by the operation of the Mortmain Act will accrue for the benefit of the persons entitled in remainder. It is the same as if the testator had only directed accumulation for twenty-one years, and had said nothing as to the income after that time till the death of his wife." Thomas Messiter in that case stood in the same position as do the testator's cousins and the school trustees in the present case, and it is obvious that the passage which I have read exactly represents the question which is now raised, and answers it in a way which is binding upon this Court, if that decision has not been overruled. It was contended by Mr. Levett that the decision is inconsistent with that of the House of Lords in *Wharton* v. *Masterman*. (2) In the first place, I would observe that Lord Davey and the other

(1) 8 Ch. D. 269. (2) [1895] A. C. 186.

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learned Lords who addressed the House evidently had not the least intention of overruling *Weatherall* v. *Thornburgh*. (1) Lord Davey referred to it (2), and distinguished it from the case then before the House. But I think the real answer is that in *Wharton* v. *Masterman* (3) the annuitants had no interest in the surplus income, and therefore there was no direction to accumulate except for the benefit of the persons who were to become ultimately entitled, and the principle of *Saunders* v. *Vautier* (4) applied. The annuitants having no interest in the surplus income, the persons entitled in remainder became entitled to it, and were, independently of the Thellusson Act, entitled to have the accumulations stopped and the property handed over to them. In my opinion *Wharton* v. *Masterman* (3) has in no way overruled *Weatherall* v. *Thornburgh* (1), and in accordance with it we must in the present case hold that the testator's cousins and the trustees of the school are not entitled to the surplus income from the expiration of the twenty-one years to the death of Kate Greatorex, but that it devolves as on an intestacy.

The second point, which is raised by the cross-appeal, turns upon the construction of the will. In several parts of the will the testator speaks of his "trust estate," but in the clause which directs the accumulation he uses the words, "the surplus income of my trust estate shall accumulate and be invested." Later on the expression "trust estate" is again used, and it was contended that the testator intended to draw a distinction between the "trust estate" and the "income of the trust estate," and that he has not provided for the destination of the accumulations of that income during the period of twenty-one years. It does not, it is said, form part of the trust estate, and the cousins and the trustees of the school are only entitled to the original trust estate without the accumulations. I think that would be going too far. I do not mean to say that such an intention might not have been expressed in the will, but it would require very clear language indeed to express it, and I think the language of this will does not enable us to draw that distinction. In my opinion the testator intended that the

(1) 8 Ch. D. 261.
(2) [1895] A. C. 200.
(3) [1895] A. C. 186.
(4) 4 Beav. 115; Cr. & Ph. 240.

accumulations of the surplus income, after payment of the annuities, should form part of the "trust estate." I think the decision of the Vice-Chancellor was right on this point also, and both appeals should be dismissed.

RIGBY L.J. I am of the same opinion. As regards the main point, the moment it was stated I thought it had been already decided by this Court. *Weatherall* v. *Thornburgh* (1) made a lasting impression upon my mind, because in it I argued the very point which has been raised here, and it was decided by the Court in my favour. Unless, therefore, that decision can be treated as overruled, it binds us completely. *Wharton* v. *Masterman* (2) has been cited as inconsistent with *Weatherall* v. *Thornburgh*. (1) In my opinion there is not the slightest inconsistency, and, indeed, in *Wharton* v. *Masterman* (2) there was nothing to raise the question which was raised and decided in *Weatherall* v. *Thornburgh*. (1) And even if there had been in the speeches of the noble Lords in *Wharton* v. *Masterman* (2) some expressions of disapproval of *Weatherall* v. *Thornburgh* (1), it would not, I think, have been right to treat such expressions, which would have been mere obiter dicta, as overruling the decision of the Court of Appeal in *Weatherall* v. *Thornburgh* (1); but in fact there was nothing of the kind. In *Wharton* v. *Masterman* (2), as Lord Davey put it, there was no effective direction for the accumulation of any part of the surplus income, and the Thellusson Act had no application. There was no breach of that Act, and there was no rule of law which would take the income away from the persons who were absolutely entitled to it.

As regards the second point, the will contains a direction for the accumulation of the surplus income of the trust estate during the life of the annuitant. No vested interest in the original trust estate or in the accumulations is given to any one; these are only contingent interests which may or may not take effect. We must treat all those interests as still contingent, for there is no rule of law that it must be assumed that a lady of a certain age will never have children, though the Court in administering estates has taken that as a guide. But here the

(1) 8 Ch. D. 261. (2) [1895] A. C. 186.

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interests in remainder, whichever of them takes effect, are contingent, the one contingent on there being children of Kate Greatorex, and the other contingent upon there being a total failure of such children. What does the testator mean by directing accumulation and not considering the Thellusson Act? Did he intend to die intestate as to the accumulations? I agree with the Master of the Rolls that such an intention might be proved by the will. But it is not by a nice examination of the particular phrases which he has used in one part or another of the will that we can arrive at that conclusion. There is a strong presumption that he intended to dispose of the accumulated surplus income in the same manner as he disposed of the capital, and I can find nothing to induce me to differ from that primâ facie conclusion. It follows, therefore, that though we have (as we are bound to do) applied the Thellusson Act to prevent the accumulation of the surplus income after the expiration of the twenty-one years allowed by the Act, and have held that the testator's next of kin take the surplus after that period, yet the accumulations of the surplus income during the twenty-one years will go to the persons who ultimately take the capital of the estate. I shrink from saying that the trustees of the school or the testator's cousins are entitled, because, though most likely they will be, yet at law we must wait to say who is entitled until the event takes place upon which the contingency can be treated as having happened the one way or the other. We cannot say they are entitled to anything at present, however much we may be disposed to think that they will be entitled at a future time. The result is that the Vice-Chancellor's judgment on both points must be affirmed, and both the appeal and the cross-appeal will be dismissed.

COLLINS L.J. I am of the same opinion for the same reasons.

Solicitors: *Busk, Mellor & Norris, for Slater, Heelis & Co., Manchester; Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester; Woodcock Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

W. L. C.

In re FULLER (A PERSON OF UNSOUND MIND NOT SO FOUND).

C. A. 1900 July 23.

Lunacy—Jurisdiction of Master—Appointment of Person to exercise Power of appointing New Trustees—Vesting Order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-ss.* 1 (*c*), 2; *ss.* 128, 129, 135—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 1.

By virtue of s. 27, sub-s. 1, of the Lunacy Act, 1891, a Master in Lunacy when, under s. 128 of the Lunacy Act, 1890, appointing a person to exercise a power of appointing new trustees which is vested in a person lawfully detained as a lunatic, has jurisdiction also, under s. 129, to make an order vesting the trust property in the new trustees when appointed.

SUMMONS by W. F. Wilson asking that J. H. Strange might be appointed to exercise the power vested in Charles Fuller (a person of unsound mind not found lunatic by inquisition) in his character of surviving trustee of a settlement dated December 10, 1888, to appoint two new trustees thereof, and that an order might be made as to all the trust property in pursuance of ss. 128 and 129 of the Lunacy Act, 1890, as to the judge might seem beneficial and expedient.

The persons beneficially entitled under the trusts of the settlement, of whom Wilson was one, were all sui juris, and the trust funds had been divided among them, with the exception of a small sum of cash and a freehold house, a conveyance of which to one of the beneficiaries had been prepared and had been approved by him and the others.

An affidavit made by Dr. Hyslop, the medical superintendent of the Bethlem Royal Hospital, stated that since April 17, 1900, Fuller had been lawfully detained in the hospital as a person of unsound mind. An order for his reception there had been made by a justice. Dr. Hyslop stated that Fuller was suffering from senile melancholia, and that in his opinion he was of unsound mind and understanding and unfit for the management of himself or his affairs, and that there was not any immediate prospect or probability of his recovery.

The beneficiaries under the trusts all consented to the application.

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The master made an order appointing Strange to exercise the power of appointing new trustees of the settlement, namely, two persons named in an affidavit made by Strange, and directed that upon the appointment being made the freehold house should vest in the new trustees. But, as he entertained some doubt as to his jurisdiction to make the vesting order, he directed that his order should be submitted to one of the Lords Justices before being issued. The order was submitted to Collins L.J. and was by him referred to the Court.

Ashton Cross, for the beneficiaries. It is submitted that (1) s. 27, sub-s. 1, of the Lunacy Act, 1891, gives the master jurisdiction to make the vesting order. It is clear that by virtue of

(1) By s. 116 of the Lunacy Act, 1890, "(1.) The powers and provisions of this part of this Act relating to management and administration apply (inter alia):—

"(*a*) To lunatics so found by inquisition;

"(*b*) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act;

"(*c*) To every person lawfully detained as a lunatic though not so found by inquisition."

"(2.) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge."

"(4.) The powers of this Act relating to management and administration shall be exercisable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic."

Sect. 128: "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power, or give the consent in such manner as the order directs."

Sect. 129: "Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a

s. 129 of the Act of 1890, a judge in Lunacy could have made a vesting order as under s. 26 of the Trustee Act, 1893, and the effect of s. 27, sub-s. 1, is to put the master in the place of the judge as regards the powers conferred by that group of sections (116 to 130) in the Act of 1890 which is headed "Management and Administration."

If a vesting order cannot be made in this way, an application must be made by petition under s. 135, treating Fuller as a lunatic, which he is not in the technical sense of the word. This will cause additional expense. The powers conferred by s. 135 can be exercised only by a judge in Lunacy; they are not transferred to the master by s. 27, sub-s. 1, of the Act of 1891. Sect. 135 does not override the provisions of ss. 128 and 129. The sections headed "Management and Administration" contain a short summary code which was intended to apply to all

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power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees."

[The group of ss. 116 to 130, both inclusive, is headed "Management and Administration."]

By s. 135, "(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs.

"(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

"(3.) An order under sub-ss. 1 and 2 shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right."

[The group of sections 130 to 143, both inclusive, is headed "Vesting Orders."]

By the Lunacy Act, 1891 s. 27, "(1.) Subject to rules in Lunacy the jurisdiction of the judge in Lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the judge in Lunacy."

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cases in which it could reasonably be made use of. In *In re Shortridge* (1) Lord Halsbury said (2): "The whole theory of the 129th section is that, instead of having to go first to one branch of the Court and then to another, or, as I have heard remarked elsewhere, instead of sending the suitor as a sort of shuttlecock between the battledores of different Courts, the order should be made by one Court. And I think the 129th section was intended in a compendious form to get rid of all the circumlocution, and to get the thing done under one piece of parchment, and to give the power to the judge in Lunacy to do everything necessary for the benefit of the lunatic, so as not to multiply different steps whereby costs and inconvenience were increased. I think we ought to construe the 129th section as embracing not only the appointment, but everything under it."

The jurisdiction of the master is carefully limited, and it is for the benefit of the lunatic and also expedient that the order should be made.

LORD ALVERSTONE M.R. It was quite proper, having regard to the difficulties which have been pointed out to us, that the matter should be considered as a question of principle. I think the master had jurisdiction to make the vesting order. [His Lordship referred to sub-s. 1 (*c*) and sub-s. 2 of s. 116 of the Lunacy Act, 1890, and continued:—] There can be no doubt that under the provisions of ss. 128 and 129, if new trustees had been appointed the judge in Lunacy could have made such an order as to the trust estate as might have been made in the same case by the High Court under the Trustee Act, 1850, or any Act amending the same, upon the appointment thereunder of new trustees of the settlement. Then s. 27, sub-s. 1, of the Lunacy Act, 1891, enables the master to exercise the jurisdiction of the judge in Lunacy "as regards administration and management." It cannot, I think, be seriously doubted that s. 129 of the Act of 1890 is included in the provisions of that Act as to "administration and management," and, if so, s. 27, sub-s. 1, gives express power to the master to exercise the power conferred by s. 129. I felt at first

(1) [1895] 1 Ch. 278. (2) [1895] 1 Ch. 283.

pressed by the fact that what I may call the analogous power conferred by s. 135 can be exercised only by the judge. That is to say, it has not been transferred to the master by s. 27, sub-s. 1, which transfers to him only the jurisdiction "as regards administration and management." But it may well have been thought by the Legislature that the limited powers which form part of the provisions for "administration and management" could properly be conferred on the master as well as on the judge. It is clear, as it appears to me, that there are many cases to which s. 135 would apply which do not come within s. 129. In my opinion, having regard to s. 27, sub-s. 1, the master had jurisdiction to make such a vesting order. By so holding we shall save the parties from the necessity of incurring a double set of costs; and, on the other hand, I can see no reason why, having regard to the provisions of the Acts, the master should not have power to make the order.

RIGBY L.J. I am of the same opinion. After a careful consideration of the language of the different sections, I think the master had power to make the order.

COLLINS L.J. I am of the same opinion.

Solicitor: *C. M. Trevor.*

W. L. C.

C. A. 1900 Aug. 8.

SACCHARIN CORPORATION *v.* CHEMICALS AND DRUGS COMPANY.

[1897 S. 3880.]

Practice—Discovery—Patent Action—Account of Profits—Disclosure of Names of Customers.

In an action for the infringement of a patent the defendants were ordered to account for profits:—

Held, that the defendants must disclose the names and addresses of their customers.

Powell v. *Birmingham Vinegar Brewery Co.*, (1896) 14 Rep. Pat. Cas. 1, followed.

This action was brought to restrain the defendants from infringing the plaintiffs' patent, No. 25,273 of 1894. The patent was for a method of making one of the ingredients which are used in the manufacture of saccharin.

At the trial of the action North J. held that the patent was valid, and that the defendants had infringed it, and he granted a perpetual injunction against them. And it was ordered that an account should be taken of all profits made by the defendants by importing into this country, and by manufacturing, selling, supplying, and using in this country saccharin manufactured in infringement of the patent.

For the purposes of the account the defendants had produced their books, but had covered up the names and addresses of their customers.

Cozens-Hardy J. refused an application by the plaintiffs for an order that the defendants should disclose those names and addresses, on the ground that the disclosure would enable the plaintiffs to sue the customers for infringement, and thus to injure the defendants' trade.

The defendant company was in voluntary liquidation, and the liquidator made an affidavit in which he said that, as the result of inquiries and investigations which he had made, he believed that the purchases by the defendant company of saccharin which might have been made by using the ingredient

protected by the plaintiffs' patent, and manufactured abroad by that process, did not exceed the sum of 1173*l.* 13*s.* 3*d.*, and that the trading expenses and other outgoings which might fairly be apportioned against those gross profits were not less than 459*l.* 9*s.* 6*d.*

The manager of the plaintiff company in his evidence said that the plaintiffs' remedy against the defendant company was of no value, because the company had no assets, and that, unless the plaintiffs could obtain the names of the customers of the defendant company from their books, the plaintiffs would be debarred from their only remedy—namely, taking proceedings against the customers as infringers.

The plaintiffs appealed.

Moulton, Q.C., and *J. C. Graham*, for the plaintiffs. As against a wrong-doer, the Court will allow a plaintiff to see every document which will assist him in proving the amount which the wrong-doing defendant ought to pay, and the Court will consider only whether the defendant is giving the fullest information to enable the plaintiff to enforce his rights. The information claimed is relevant, and the Court will not consider what the consequences may be to the wrong-doer. It cannot be assumed as against him that his books have been honestly kept, and the disclosure of the names of the customers will enable the plaintiffs to test the truth of the entries in the books. The discovery ought not to be limited because of possible consequences to the defendants or their customers. If the customers have been doing wrong, the disclosure of their names will no doubt assist the plaintiffs in taking proceedings against them; but they cannot be sued unless they have done wrong. The entries in the defendants' books are relevant to the action, but they are not conclusive against the plaintiffs. When an inquiry as to damages has been directed in actions of this nature it has been held that the defendant must disclose the names and addresses of his customers: *Leather Cloth Co.* v. *Hirschfeld* (1); *Murray* v. *Clayton* (2); and the same principle applies when an account of profits has been directed. The

(1) (1863) 1 H. & M. 295. (2) (1872) L. R. 15 Eq. 115.

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plaintiffs are entitled to an opportunity of testing the truth of the entries in the defendants' books. The learned judge has really based his decision upon a ground which was repudiated in *Murray* v. *Clayton*. (1) To make use of the discovery for the purpose of proceeding against the customers would not be an abuse of the process of the Court. There is nothing oppressive in proceeding against a wrong-doer.

A. J. Walter, for the defendants. The disclosure of the names and addresses of the defendants' customers would be relevant to an inquiry as to damages; it is not relevant when an account of profits has been directed. There is a great distinction between the two remedies. When a patentee elects to take an account of profits, he condones the defendant's wrong-doing and treats him as a licensee: *Neilson* v. *Betts* (2); *De Vitre* v. *Betts*. (3)

[LORD ALVERSTONE M.R. *Powell* v. *Birmingham Vinegar Brewery Co.* (4) seems to be in point.]

There the action was brought to restrain the improper use of a trade name—not to restrain the infringement of a patent.

LORD ALVERSTONE M.R. This case was not so fully argued before Cozens-Hardy J. as it has been before us. The case was treated somewhat summarily before him, and, therefore, in differing from him we are not really overruling his decision. I do not wish to throw any doubt upon the distinction between the position of a patentee who elects to take an account of profits made by the defendant and that of a patentee who elects to take an inquiry as to damages. As was pointed out by the House of Lords in *Neilson* v. *Betts* (2), and this distinction has been recognised for many years, a patentee who elects to take an account of profits stands in the shoes of the infringer and condones his wrong-doing, and is entitled only to the profits made by the infringer. But we have now to consider whether, when an account of profits has been directed, the entries in the defendant's books being primâ facie material for the purpose of ascertaining what the profits are, the wrong-doer is entitled to

(1) L. R. 15 Eq. 115.
(2) (1871) L. R. 5 H. L. 1, 22.
(3) (1873) L. R. 6 H. L. 319.
(4) 14 Rep. Pat. Cas. 1.

cover up any part of the entries upon the ground that the plaintiff may make some improper use of it, or a use which is not actually germane to the proceedings in the action. If I thought that the present application was really an abuse of the process of the Court, or that it was intended to use the names of the customers for an improper purpose, I should not hesitate to limit the inspection. But I think it would be going too far to say that the simple allegation by a defendant who has to account for profits that he will have to disclose the names of his customers is sufficient to justify the Court in ordering those names to be covered up.

It is not disputed that in the case of an inquiry as to damages the defendant is not entitled to cover up the names. This was decided in *Murray* v. *Clayton* (1), and that decision was followed in the *American Braided Wire Co.* v. *Thompson & Co.* (2) and in other cases. The same principle was applied in *Leather Cloth Co.* v. *Hirschfeld* (3), where an inquiry as to damages had been directed, and in the prosecution of the inquiry the defendant gave evidence as to the number of articles which he had disposed of, and on his cross-examination objection was taken to the disclosure of the names of his customers. Upon principle I think the rule laid down in *Murray* v. *Clayton* (1) was right, namely, that when you are dealing with a wrong-doer you must not be astute to protect him from giving full discovery, because some consequences may flow from that discovery, which has been necessitated by his own wrongful act.

But the decision of this Court in *Powell* v. *Birmingham Vinegar Brewery Co.* (4) seems to me directly in point. In that case the action was brought in respect of the infringement of a trade name, an injunction was granted, and an account of profits directed. The defendants delivered accounts shewing the sales of the article complained of, but they objected to disclose the names and addresses of their customers upon the very ground which is now suggested. Lindley L.J. held that the names could not be kept back, and the Court affirmed an order that the defendants should deliver to the

(1) L. R. 15 Eq. 115.
(2) (1888) 5 Rep. Pat. Cas. 375.
(3) 1 H. & M. 295.
(4) 14 Rep. Pat. Cas. 1.

C. A. 1900 SACCHARIN CORPORATION v. CHEMICALS AND DRUGS COMPANY. Lord Alverstone M.R.

plaintiff a list of the names and addresses of their customers. I think that when an account of profits has been directed primâ facie the plaintiff is entitled to have full information as to how the profits are arrived at, and I do not think that right can be cut down because it is suggested that in giving the information the names of the defendant's customers will be disclosed, and that it would or might be injurious to his trade if they were disclosed. Having regard to the practice which has prevailed in respect of inquiries as to damages and of accounts of profits in trade-mark cases, the privilege which the defendants claim ought not, I think, to be allowed, and in my opinion the learned judge ought to have ordered that the entries in the defendants' books should be fully disclosed to the plaintiffs.

RIGBY L.J. I am of the same opinion. It appears to me that in *Powell* v. *Birmingham Vinegar Brewery Co.* (1) the point now raised was really discussed and decided by this Court.

COLLINS L.J. I am of the same opinion. Apart from authority, it seems to me that on principle the matter is perfectly clear. It is admitted by the defendants that the entries in which the names of their customers appear are relevant to the account. That being so, they must disclose those entries, unless they can bring themselves within some privilege which relieves them from so doing. They have been unable to vouch any such principle, and when the authorities are referred to it appears to have been expressly decided that the ground which the defendants set up, namely, that the disclosure of the entries would involve a disclosure of the names of their customers, is not one which the Court will treat as excusing them from giving the discovery. Therefore, on principle apart from authority, as well as upon clear authority, the defendants are not relieved from disclosing the names of their customers.

Solicitors: *J. H. & J. Y. Johnson; J. W. Asprey.*

(1) 14 Rep. Pat. Cas. 1.

W. L. C.

In re DIXON.
HEYNES *v.* DIXON.

C. A.
1900
May 17, 21;
June 1.

[1898 D. 245.]

Husband and Wife—Marriage Settlement—Wife's Property—Life Interest—Separate Use—Restraint on Anticipation—Trust Fund—Loan to Husband—Bond by Husband to Trustees—Interest-bearing Security—Interest on Bond—Penalty—Damages—Express Trust—Bond in Husband's Possession—Presumption of Payment—Statute-barred Debt—4 & 5 Anne, c. 16, ss. 12, 13 (c. 3 in 1 Rev. Stat. p. 784)—Statute of Limitations—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 5.

By a marriage settlement, dated in 1847, a fund belonging to the wife was vested in trustees in trust for investment "on real or personal securities bearing interest," with power of varying investments with the written consent of the husband and wife or the survivor, and to pay the income to the wife for her separate use without power of anticipation, then to the husband for life, and after the death of the survivor, as to the capital, upon the trusts therein mentioned.

In 1852 the trustees, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. per annum six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months.

The husband and wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 and the husband in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—

Held, affirming Byrne J., [1899] 2 Ch. 561, that the bond debt was not barred by the Statute of Limitations (3 & 4 Will. 4, c. 42), s. 5, on the grounds (1.) that the bond, being a penalty bond, was an interest-bearing security carrying interest (though not mentioned) beyond the date fixed for payment of the debt; (2.) that as the husband and wife had lived together in amity it was unnecessary, in order to prevent the statute from running, to go through the formality of the husband paying the interest to the trustees, the trustees paying it to the wife, and the wife paying it to the husband; and (3.) that, as the husband took with full notice that the money lent was trust money and liable to investment on interest-bearing security, he was in the position of an express trustee: *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, 396:

Held, also, that no presumption of discharge of the bond arose from the mere fact of its being in the obligor's possession at his death.

Sects. 12 and 13 of the statute 4 & 5 Anne, c. 16, merely recognised and

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confirmed the doctrine, previously established by the Court of Equity, that, in the case of a bond with a penalty, the true intent of the penalty was to secure payment, not only of the stated principal money and interest on the day fixed, but also of subsequent interest down to the actual payment of the principal, although the bond contained no stipulation for interest beyond the day fixed. Under that statute the interest is payable as interest, and not as damages for non-payment on the day fixed.

The nature of single and penalty bonds, and the liability to interest on them respectively, discussed.

Bonafous v. *Rybot*, (1763) 3 Burr. 1370, *Spickernell* v. *Hotham*, (1854) Kay, 669, *Amos* v. *Smith*, (1862) 1 H. & C. 238, *Cook* v. *Fowler*, (1874) L. R. 7 H. L. 27, and *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, discussed.

BY the settlement, dated October 1, 1847, made on the marriage, afterwards solemnized, of Thomas Dixon and Jane Heynes, the one-fifth undivided share of Jane Heynes in certain real estate was conveyed by her to her brothers Philemon Baylis Heynes and James Heynes, upon trust, after the solemnization of the marriage, to sell the same and to invest the proceeds in the Government funds, "or upon real or personal securities bearing interest," with power to vary and exchange them for others of the like nature, "provided that no such investment or change shall be made during the lives of the said Jane Heynes and Thomas Dixon, or the life of the survivor of them, without her or his consent first obtained in writing": and upon further trust, during the life of the said Jane Heynes, to pay the income of the investments to such persons as she should by writing from time to time, "but not by way of anticipation," appoint; and, in default of any such appointment, to pay such income to her for her separate use; and after her death to pay such income to the said Thomas Dixon during his life; and after the death of the survivor, to pay or transfer the capital of the trust funds to such persons as the said Jane Heynes should by deed or will appoint, and, in default of appointment, to or among the children of the marriage as therein mentioned; and it was thereby declared that in default of children of the marriage (which happened) the trust funds should, subject to so much thereof as should not have been disposed of under any of the powers aforesaid, after the respective deceases of the said Jane Heynes and Thomas Dixon, be paid and transferred to such persons as would have been

entitled thereto as the next of kin of the said Jane Heynes at the time of her decease if she had died sole and intestate, to the exclusion of the said Thomas Dixon, either as the administrator or by right of marriage. And the deed contained a covenant for the settlement of any after-acquired property of the said Jane Heynes.

By an indenture dated September 16, 1851, the entirety of the real estate, whereof one-fifth share had been settled by Jane Heynes (then Jane Dixon), was conveyed to trustees in trust for sale and to hold the net proceeds in trust, as to one-fifth part thereof, for the said Jane Dixon absolutely, and as to the other four-fifths, in trust for the several persons therein mentioned. The entirety of the real estate so conveyed was sold by the trustees, part being purchased by Thomas Dixon himself. Mrs. Dixon's share of the net proceeds of sale amounted to 1928*l.* 5*s.* 10*d.*, and to enable her husband to complete his purchase it was arranged between the husband and wife and the trustees of their settlement that this sum should be lent to the husband upon the security of his bond and upon the wife's written authority. Thereupon, by a memorandum in writing dated February 12, 1852, signed by her and addressed to the trustees of her settlement, Mrs. Dixon gave them her authority and consent to lend the 1928*l.* 5*s.* 10*d.* to her husband Thomas Dixon, "upon his giving to you his bond or obligation in writing, conditioned for payment of the said sum of 1928*l.* 5*s.* 10*d.* with interest thereon at the rate of 4 per cent. per annum at the expiration of six calendar months from the date thereof." The trustees accordingly lent the 1928*l.* 5*s.* 10*d.* to Thomas Dixon, who gave them his bond under seal, dated February 13, 1852, whereby he bound himself, his heirs, executors, and administrators, to the trustees and the survivor of them, or their or his attorney, executors, administrators, or assigns, in the penal sum of 3856*l.* 11*s.* 8*d.* (that is, double the amount of the loan), the condition being as follows: "The condition of the above-written obligation is such that if the above-bounden Thomas Dixon, his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid to the said Philemon Baylis Heynes and

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James Heynes (as trustees under the settlement made upon the marriage of the said Thomas Dixon with Jane his now wife, late Jane Heynes, spinster), or the survivor of them, or the executors, administrators, or assigns of such survivor, the full sum of 1928*l.* 5*s.* 10*d.* of lawful money, &c., with interest for the same at and after the rate of 4*l.* per centum per annum upon the 13th day of August now next ensuing, without any deduction or abatement whatsoever, then the above-written obligation shall be void and of no effect, or else shall remain in full force and virtue." Thomas Dixon never repaid to the trustees of the settlement the 1928*l.* 5*s.* 10*d.*, or any part thereof, nor did he ever pay either to them or to his wife any interest on the debt, or give any written acknowledgment of his indebtedness further than by the bond itself.

There was no issue of the marriage. Mrs. Dixon died on May 21, 1876, intestate and without apparently having exercised her power of appointment under the settlement; whereupon, under the ultimate trusts of the settlement, the trust funds became divisible, subject only to her husband's life interest, among her next of kin exclusive of her husband. Her brother, James Heynes, who was then the surviving trustee of the settlement and one of her three next of kin, thus became beneficially entitled, subject to Thomas Dixon's life interest, to one-third of the trust funds.

Thomas Dixon died on January 1, 1896, having made a will appointing executors.

During the whole of their joint lives Mr. and Mrs. Dixon lived together in amity.

This was an action, commenced by originating summons, by the present trustees of the settlement, and another, on behalf of themselves and all other the creditors of Thomas Dixon, against his executors, for administration of his estate.

The plaintiffs, the trustees of the settlement, claimed payment out of the estate of the bond debt of 1928*l.* 5*s.* 10*d.* with interest at 4 per cent. per annum from the date of the obligor's death.

The question was whether or not, assuming that the bond had never been paid off by Thomas Dixon, as to which there

was a dispute on the evidence, the claim was barred by the Statute of Limitations.

A singular circumstance was that the bond was not in the possession of the claimants the trustees; but from the evidence, which was on affidavit only, without any cross-examination of the deponents, it appeared that after the claim had been made search was made among Thomas Dixon's papers belonging to him at his death, and the bond, and also the memorandum of authority were found in his house in a bundle of old papers which had been, it was said, in his possession for many years. How the memorandum and bond came into his possession was not clear, but it appeared that down to 1877, those documents, together with the settlement of 1847, the deed of 1851, and the title deeds of the property purchased by him from the trustees of that deed, were kept in a box at the office of the solicitors of the Dixon family who had prepared the settlement, the deed of 1851, and the memorandum and bond, and had carried out the sales under that deed, and were the solicitors also to the trustees of the settlement; that in 1877, after Mrs. Dixon's death, at an interview Thomas Dixon had with his solicitors at their office with reference to a proposed sale of a small piece of land of which part belonged to himself and part was after-acquired property of his late wife, the settlement and bond were produced from the box, when he remarked that the bond had better remain where it was, in consequence of the money due on it being unpaid, and that thereupon it was returned to the box, but the settlement he took away with him; and that in June, 1887, his then solicitor, who had since died, handed over to him at his request the whole of the documents and papers in the box. These were numerous and bulky, and were comprised in nine bundles, in one of which the memorandum and bond were, it was said, afterwards found, having apparently been handed over with the other documents by mistake. James Heynes, the survivor of the original trustees of the settlement, died on June 17, 1897, some eighteen months after Thomas Dixon, but although he was beneficially interested under the settlement it did not appear that he made any claim, either

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as trustee or beneficiary, against Thomas Dixon in respect of the bond.

On August 3 and 8, 1899, the action was tried before Byrne J., who, as already reported (1), held that the bond debt was not barred.

The defendants, Thomas Dixon's executors, appealed.

The appeal was heard on May 17 and 21, 1900.

Levett, Q.C., and *W. Baker*, for the defendants. It is submitted that the bond debt was barred at the death of the wife. First, this is to be regarded as a common money bond for payment of a principal sum with interest on a fixed date, with no stipulation for further interest. It is not an interest-bearing security. At common law an agreement to pay a sum of money on a fixed date does not carry interest; but interest may in certain cases be recovered by way of damages; and a bond is on the same footing at law as an agreement to pay a sum of money. The damages are limited by the amount of the penalty. There may, of course, be a special contract for payment of interest, but here the contract extended only to the payment of interest for six months: *Cook* v. *Fowler* (2); *Cameron* v. *Smith* (3); Bullen and Leake's Precedents of Pleading, 2nd ed. p. 544. Therefore s. 5 of the Statute of Limitations, the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), does not apply, and the debt was barred after the lapse of twenty years.

[WEBSTER M.R. *Cook* v. *Fowler* (2) was the case of a warrant of attorney and defeasance, not of a bond.]

No distinction is made in any of the cases between the two. In an action on a penalty bond, interest cannot be recovered beyond the penalty, except under special circumstances: *M'Clure* v. *Dunkin* (4); *Clarke* v. *Seton*. (5) Where there is no stipulation for interest, interest is recoverable only as damages: *In re Roberts*. (6) *Bonafous* v. *Rybot* (7), on which

(1) [1899] 1 Ch. 561.
(2) L. R. 7 H. L. 27.
(3) (1819) 2 B. & Ald. 305, 307; 20 R. R. 444.
(4) (1801) 1 East, 436.
(5) (1801) 6 Ves. 411.
(6) (1880) 14 Ch. D. 49.
(7) 3 Burr. 1370.

Byrne J. relied, was a case under the Act 4 & 5 Anne, c. 16, s. 13 (1), which relates only to the terms of the redemption and discharge of a bond—that is, the effect of the statute is only to enable the defendant sued upon a bond to obtain relief by payment of the principal and interest due into court. The case has no further application to the present. The same observation applies to *Farquhar* v. *Morris.* (2)

Secondly, when interest has to be paid by a husband to trustees for the separate use of his wife, without power of anticipation, and no demand for the interest is made by the wife, it cannot be properly said that payment is made by the husband to himself, so that the same hand has both to pay and receive. *Amos* v. *Smith* (3) is an authority rather in our favour than against us, for the decision rested on the fact that receipts were given which prevented the statute from running.

[RIGBY L.J. Would your argument be the same if in this case the husband had been the first tenant for life?]

Yes. *Caton* v. *Rideout* (4) shews that, where money payable to the wife for her separate use is paid to the husband by the trustees with her assent, the wife cannot afterwards claim against the husband's estate. There are two cases apparently against us, *Mills* v. *Borthwick* (5) and *In re Hawes* (6); but the first does not involve the question of the imaginary payment by the wife

(1) Sect. 12 of the statute 4 & 5 Anne, c. 16 (c. 3 in Rev. Stat. vol. i. p. 784), enacts that "Where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain," if the obligor have, before action paid to the obligee the principal and interest due by the defeazance or condition, though such payment was not made strictly according to the condition or defeazance, it may be pleaded in bar of the action as effectually as if the money had been paid according to the condition or defeazance. And s. 13 enacts that "if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly."

(2) (1797) 7 T. R. 124.

(3) 1 H. & C. 238.

(4) (1849) 1 Mac. & G. 599.

(5) (1865) 35 L. J. (Ch.) 31; 13 W. R. 707.

(6) (1892) 41 W. R. 173; 62 L. J. (Ch.) 463.

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to the husband. The second is, we submit, wrongly decided, and cannot stand with the two authorities of *Spickernell* v. *Hotham* (1) and *Stone* v. *Stone*. (2) Here there were no children of the marriage, and what was more likely, therefore, than that the wife should make a gift of this debt to the husband? Why, then, should not the Court assume that it has been paid? Upon the evidence, the plaintiffs do not discharge the onus that lies on them to prove that the debt is still due. As a rule of prudence, a claimant against a dead man's estate must adduce definite proof in support of his claim, apart from his own evidence, unless that evidence is in itself sufficient: *In re Finch* (3); *In re Hodgson* (4), following the old rule in *Fladong* v. *Winter*. (5) The facts are sufficient to lead to the presumption that the debt has been discharged; and it is remarkable that James Heynes, who was a beneficiary as well as a trustee under the settlement, did not make any claim to the debt during the eighteen months he survived the obligor.

Haldane, Q.C., and *Christopher James*, for the plaintiffs. Upon the first point, we do not dispute that, where there is an agreement to pay a sum of money on a day certain, without any reference to interest, the liability for breach is not to interest but to damages, as in *Cook* v. *Fowler* (6); but we say that in the cases upon the statute 4 & 5 Anne, c. 16, s. 13, the Courts have put a special construction upon a penalty bond, by treating it as an obligation to pay the principal sum and also interest—not damages: *Bonafous* v. *Rybot* (7); *Farquhar* v. *Morris* (8); the intent of the bond being to secure, by means of the penalty, payment of principal, interest, and costs. The word "interest" and not "damages" is in fact used in s. 13 of the Act with reference to a "bond with a penalty"—the only other section in which a "bond" is mentioned is s. 12—and in *Amos* v. *Smith* (9) the Court assumed that on a penalty bond interest was payable, and not damages. On a single bond—that is, a bond without a penalty—conditioned simply for pay-

(1) Kay, 669, 675.
(2) (1869) L. R. 5 Ch. 74.
(3) (1883) 23 Ch. D. 267.
(4) (1885) 31 Ch. D. 177.
(5) (1812) 19 Ves. 196.
(6) L. R. 7 H. L. 27.
(7) 3 Burr. 1370.
(8) 7 T. R. 124.
(9) 1 H. & C. 238, 241.

ment of a principal sum on a day certain, no interest is payable: *Hogan* v. *Page* (1), where the distinction is shewn between a "single" bond and a "penalty" bond, or, to give it the correct description, an "obligation." If an action is brought on a penalty bond, s. 13 of the statute of Anne applies. *Cameron* v. *Smith* (2) also illustrates the distinction between a single bond and a penalty bond. It is there stated (3) that, in the case of a penalty bond, the liability to interest is put upon the footing that it is part of the contract, to be extracted from the penal clause. *Foster* v. *Weston* (4) and *Walters* v. *Meredith* (5) are also authorities shewing that, while a single bond does not carry interest in the absence of any stipulation for interest, a penalty bond does carry interest, and to the extent of the penalty.

But assuming that we are wrong in our view on the first point, as to the construction of the statute, and that no interest is payable at law upon the bond, then upon the second point, as to the effect of the receipt by the husband of the wife's income, we rely upon the important circumstance that by the settlement the wife was restrained from anticipation. That being so, it was the duty of the trustees to have invested the wife's settled share of the proceeds of sale of the real estate, so as to provide a proper income for her. Therefore, when they lent the money to the husband, they either lent it upon an interest-bearing security, or else committed a breach of trust in lending it on a security without interest, for they were bound to pay interest to the wife, and she could not release it. In the former case the statute does not run, and in the latter case, as the husband had notice of the trust, his estate is chargeable with interest on the money that was in his hands. He thus became affected with an express trust, and stood in the same position as the trustees. Accordingly, the debt remains trust money, and it is not barred by any statute of limitations: *Ernest* v. *Croysdill* (6), the principle of which case

(1) (1798) 1 Bos. & P. 337, and n. (*a*).
(2) 2 B. & Ald. 305; 20 R. R. 444.
(3) 2 B. & Ald. 308.
(4) (1830) 6 Bing. 709.
(5) (1838) 3 Y. & C. Ex. 264.
(6) (1860) 2 D. F. & J. 175, 198.

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was applied by Kindersley V.-C. in *Coxwell* v. *Franklinski* (1), a case very like the present. *Spickernell* v. *Hotham* (2) and *Soar* v. *Ashwell* (3) are authorities to the same effect, the rules as to constructive and express trusts being fully stated by the Court of Appeal in the last-mentioned case. Here, as the husband had trust money in his hands, knowing it to be trust money, he was an express, and not merely a constructive, trustee; and that being so, no statute runs in his favour. There could not be any gift by the wife to the husband, as in *Caton* v. *Rideout* (4) and *In re Flamank* (5), because of the restraint on anticipation. As to the contention that this is an uncorroborated claim, the evidence as to how the bond got into the husband's possession is enough to rebut the presumption that the bond was paid: the mere possession of the bond by the debtor is not in itself sufficient evidence of payment.

Levett, Q.C., in reply. On the first point, it is true that the statute of Anne is following out the rule in equity, but my contention is that interest is not payable upon this bond at all. What is got in the shape of interest under the statute of Anne is only payable as part of the penalty. By the statute part of the penalty—that is, interest—is released, but it does not make what is left the less "penalty."

As to the contention that the husband is a trustee—a point not taken in the Court below—that is contrary to *Mara* v. *Browne.* (6) It is stated in Lewin on Trusts (9th ed. p. 113; 10th ed. p. 117) that there are only two ways in which a trust may be declared, either eo nomine in the form and terms of an express trust, or by intention, which the Court will effectuate through the medium of an implied trust. Here there was neither.

[RIGBY L.J. Do you deny that a man who takes trust money, knowing that it is trust money, is an express trustee?]

Yes. An implied trust is created by circumstances, while an express trust can only be created by express declaration. I say the husband in this case was not in any shape or form an

(1) (1864) 11 L. T. 153.
(2) Kay, 669.
(3) [1893] 2 Q. B. 390.
(4) 1 Mac. & G. 599.
(5) (1889) 40 Ch. D. 461.
(6) [1896] 1 Ch. 199.

express trustee. Then was he an implied trustee? I answer, No. He was simply a borrower of money from trustees who had power to lend it on "personal security." He was no more an implied trustee than a banker who opens a trust account. You cannot, by applying the equitable doctrine that a man who has money in his hands with notice of a trust is a trustee, make a man who rightfully has trust money in his hands a trustee in any sense. He is merely agent of the actual trustees, and the fact of his being an agent does not make him an implied trustee. An implication of trust only arises where there have been improper dealings with the trust fund.

As to *Coxwell* v. *Franklinski* (1), it is not even mentioned in Lewin on Trusts, though it is just mentioned in Shelford's Real Property Statutes, 9th ed. p. 235, and the decision is one that cannot be supported.

[RIGBY L.J. Kindersley V.-C. was one of the greatest masters of equity and of trust law we ever had.]

The case is opposed to the whole current of authority.

Cur. adv. vult.

1900. June 1. WEBSTER M.R. This is an appeal from Byrne J., and the sole question is whether, under the circumstances, a bond given in the year 1852 is statute-barred.

In order to explain the view which I take in this case, I will very briefly state the material facts. By a settlement made in 1847 on the marriage of Jane Heynes, afterwards Mrs. Dixon, her share of certain real estate was conveyed to trustees upon trust for sale and to invest the proceeds on real or personal securities bearing interest, with power to vary or exchange the investments for others of the like nature; with a proviso that no such investment or change should be made during the lives of the wife and husband or the life of the survivor without her or his consent in writing first obtained. Then, the income was to be paid to the wife for life, without power of anticipation, and after her death to the husband for life.

There being a sale of the real estate Mrs. Dixon's share of which was subject to her settlement, the husband bought part

(1) 11 L. T. 153.

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of it, and as he was not prepared with all the purchase-money, the trustees advanced to him, with his wife's consent in writing, the sum of 1928*l.* 5*s.* 10*d.*, being her settled share of the purchase-money. Thereupon, with the knowledge of the wife and by her authority, a bond was given by the husband to the trustees on February 13, 1852, in the usual form, in a penal sum for double the amount—namely, for 3856*l.* 11*s.* 8*d.*, the condition of the bond being that if the husband should repay the sum of 1928*l.* 5*s.* 10*s.* with interest at 4 per cent. on August 13 then next—that is, six months after the date of the bond—the bond should be void. No payment of interest ever took place during the lifetime of the wife, and no repayment of the principal either during her lifetime or after her death. The wife died on May 21, 1876, and the husband on January 1, 1896. After the death of the husband the bond was found amongst his papers; and, as a point arises on that, I shall have to say a word or two upon it later on.

Now, the principal contention which was raised before us on the part of the appellants, the husband's executors, was that this was to be regarded as a common money bond for the repayment of money; and that, applying the principle of *Cook* v. *Fowler* (1), and particularly the proposition laid down by Lord Selborne, that there is no general rule of law that in a contract for repayment of money borrowed for a fixed period on a day certain with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest will be implied, we ought to treat this bond as being statute-barred upon the ground that there had been no payment or acknowledgment within a period of twenty years, the twenty years having expired in the year 1872, during the lifetime of the wife. We were further pressed by counsel for the appellants that the effect of the statute of Anne was only to give power to a person sued upon a bond to pay the principal and interest into court, and thereby get relief. Now, if this had to be regarded as a case of a simple contract under a bond with a penal sum, in the hands of third parties, that is, of independent parties, I am not prepared to say that we might

(1) L. R. 7 H. L. 27.

not have to consider that point and decide whether or not it fell within the rule laid down in *Cook* v. *Fowler*. (1) But, having regard to the view which I take of the law, I cannot accede to the argument of the appellants.

I have had an opportunity of seeing the judgment which has been written by my brother Rigby dealing with many of the cases bearing on this branch of the law, and therefore I do not think it necessary to go through them all myself, but I will state as clearly as I can what I understand to be the law. I think it has been considered, certainly ever since the decision and the judgment of Lord Mansfield in *Bonafous* v. *Rybot* (2), that the true intent of such a contract as that embodied in this bond is to secure the repayment of principal, interest, and costs by means of the penalty. *Amos* v. *Smith* (3) was a case in which a question arose as to whether or not receipts had been given to the husband in respect of the wife's interest under a somewhat similar instrument. Without going so far as to say that the decision in that case is a direct decision that the same rule should be applied to a contract at law, it appears to me that both Martin B. and Bramwell B. in their judgments implied that that was the rule according to which such a contract should be construed. I think, therefore, that ever since the decision in *Bonafous* v. *Rybot* (2) these contracts have certainly in the courts of equity been regarded as contracts to secure the repayment of principal and interest by means of the penalty. We were pressed to say that no suit would have been entertained for interest alone, the principal not being claimed. I do not know that it is necessary to decide that; I certainly should have thought it was open to argument whether a court of equity would not have had jurisdiction to order interest if the plaintiff was seeking interest only, and was not seeking repayment of the principal; but it may be that if the parties went on their strict rights, the contract ought to be regarded as a contract for payment, secured by a penalty, of principal and interest by a certain date.

There is, however, in my opinion, another incident in

(1) L. R. 7 H. L. 27.
(2) 3 Burr. 1370.
(3) 1 H. & C. 238.

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connection with this case that I do not think should be lost sight of, and that is the fact that the bond was given by the husband in respect of a loan to him with full notice of the terms of the settlement. It appears on the face of the bond that this money was advanced by the trustees of the settlement and was to be repaid to them; and from the terms of the investment clause it is obvious that the trustees had no power to invest except upon interest-bearing securities. Now, if by "personal security" is meant an interest-bearing security, then there would apparently be nothing unusual in such a security as that in the present case being taken, assuming it comes within the words "personal security." It is perhaps not necessary to consider this, but I think that the position of the husband, in taking the money and giving such a bond as this, brings him within the class of those persons who are regarded as bound to a great extent by the same rules as bind express trustees. We were pressed as to the distinction between express trustees and implied or constructive trustees. In *Soar* v. *Ashwell* (1) Bowen L.J., after enumerating two classes of persons who are subject to the rule that time is no bar in the case of express trusts, states a third class as follows (2): "Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant." Having regard to that statement, I think that treating this bond as having been given by the husband in consideration of an advance of what he knew to be trust money, which advance was in effect a breach of trust, he was in the position contemplated by Bowen L.J., and was not a person entitled to plead the Statute of Limitations as a bar to the recovery of the money that was in his hands. But, from whatever point of view the question is regarded, it seems to me it would be an extremely difficult thing to say that the statute would run during the lifetime of the wife. It seems clearly established on the authorities that in a case of this kind, where the husband is in receipt of the wife's income, so long as the husband and wife are living together in amity the form

(1) [1893] 2 Q. B. 390. (2) [1893] 2 Q. B. 396.

need not be gone through of handing the money from the one to the other. With regard to the case of *Amos* v. *Smith* (1), to which I have already referred, I do not understand that case to have rested solely on the fact that receipts had been given. Lord Bramwell said distinctly that no suit in equity could be maintained by the wife against the trustees in respect of the income which the husband had received. We were asked to say that it was necessary that some formality should be gone through in the shape of receipts being given by the one or the other, in order to prevent the statute from running. I cannot take that view. I think the effect of the principle which has been acted upon in many cases in courts of equity is, that if husband and wife are living together in amity and the wife's income is being received by the husband, as in the present case, the statute does not run. Therefore, it being common ground that unless the liability on the bond was barred at the death of the wife it has not been barred since, I think, subject to the one remaining consideration which I have to consider, the bond was in force at the date of the wife's death.

We were then pressed on behalf of the appellants to say that the circumstances amounted to sufficient proof that the bond had been paid, and reliance was placed on the following facts alleged in the affidavits: that one of the trustees, James Heynes, was personally interested in a share of the trust funds; that the husband had died in January, 1896; that James Heynes did not die till June, 1897, so that there was a period of eighteen months during which James Heynes, having a personal interest in a share, might have claimed the benefit of this bond; and that the bond was found among the husband's papers after his death. I cannot, however, come to such a conclusion. It is to be observed that there was no cross-examination of the deponents, but there is one fact which has a very strong bearing on the case, and that is—it is in evidence before us—that in the year 1877, after the wife's death, the husband said the bond should not remain with him, but should be kept by the solicitors to the trustees, on the ground

(1) 1 H. & C. 238.

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that it had not been repaid. I think, under those circumstances, inasmuch as there was a clear recognition by the husband after the wife's death and twenty-five years after the date of the bond, that the bond had not been paid, we ought to be slow in drawing the inference that it had been paid simply because it does not happen to have remained with the trustees. It must also be remembered that the husband was tenant for life after the wife, and that he had purchased some of the property the wife's share of which had been settled; and I think the suggestion made with regard to the bond being in his possession is not an unnatural one, namely, that the bond may have been kept with the deeds to which it, to a certain extent, related, and was handed over to the husband per incuriam. There is no evidence of actual repayment after 1877. I concur with the learned judge below that it would be a strong inference to draw from the mere fact of possession by the husband, through the bond being found amongst his papers after his death, to say that is sufficient to satisfy the Court that the bond has been paid.

For these reasons I think the judgment of the learned judge is correct, and that this appeal ought to be dismissed with costs.

RIGBY L.J. delivered a written judgment as follows:—As a main part of the appeal in this case was based upon the argument that a bond within the statute 4 & 5 Anne, c. 16, s. 13, does not carry interest properly so called, but that damages only can be recovered for non-payment of the sum secured by the bond, though a jury may give such damages in the shape of interest, it may be worth while to repeat the often-stated grounds which shew such argument to have no foundation.

The Court of Chancery gave relief against the strictness of the common law in cases of penalty or forfeiture for non-payment of a fixed sum on a day certain, on the principle that the failure to pay principal on a certain day could be compensated sufficiently by payment of principal and interest with costs at a subsequent day. It had no jurisdiction, until quite modern times, to give damages for breach of contract, but could always refer it to a master to compute interest and costs.

The principle included, but was not confined to, the case of a common money bond with a penalty, but of course did not extend to the case of a single bond where there was no penalty to relieve against. The explanation given by Lord Macclesfield L.C. in the leading case of *Peachy* v. *Duke of Somerset* (1) has always been received as correct: "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired"—that is, principal and interest.

The case before Lord Macclesfield was one of an attempt to obtain relief against forfeiture of copyholds grounded on the laws relating to copyhold tenure, and failed because the principle of the Court did not include such cases; but the Lord Chancellor says: "Even in the case of copyholds there are some cases of forfeiture intended for a different purpose, as for non-payment of rent or fines, which are only by way of security of the rent or fine; and therefore when these are paid afterwards with interest, the money itself is paid according to the intent, only as to the circumstance of time." In *Reynolds* v. *Pitt* (2) Eldon L.C., speaking of the relief in equity against forfeiture, says (3): "The origin of this doctrine is to be attributed to those cases, in which relief was given originally with reference to non-payment of money at the specified time: this Court holding, that by the payment of interest the party was put in just the same state, as if the principal had been paid at the time stipulated." The context shews that Lord Eldon had grave doubts as to the soundness of this doctrine originally; but this only makes his statement of the doctrine really acted upon more valuable. In the same case he mentions, as the earliest reported authority on the point, the case of *Cage* v. *Russel.* (4) It is not a case of a bond but of a will—a very remarkable case illustrating the manner in which the principle was applied. Of course, as the payment of interest was due to the doctrine of the Court, it was altogether unimportant whether or not interest was mentioned in the original contract.

(1) (1720) 1 Str. 446, 453.
(2) (1812) 19 Ves. 134.
(3) 19 Ves. 140.
(4) (1681) 2 Ventr. 352.

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In the special case of a money bond with a penalty, the Court therefore held that the true intent of the penalty was to secure payment, with or without antecedent interest, of the principal money on the day fixed, and that non-payment was to be compensated for by payment at a subsequent day with interest down to the date of payment. This subsequent interest was, therefore, held to be due upon the bond, though not mentioned therein.

The statute 4 & 5 Anne, c. 16, ss. 12 and 13, recognised and confirmed this doctrine in the case of bonds with a penalty, and it thenceforth became binding on the common law courts. Thenceforward the cases in the common law courts become important, and the decisions in those courts are to be considered, though the principle on which courts of equity proceeded was not varied. Outside cases within the statute of Anne, the Court of Chancery alone had jurisdiction to relieve against forfeiture: see for a modern case of its exercise *In re Dagenham (Thames) Dock Co.* (1), per James and Mellish L.JJ.

Before, however, noticing particularly the common law cases, it will be convenient to call attention to the large class of cases (including all except those where the penalty is intended to secure a money payment only) in which it remained necessary to call in a jury to ascertain damage with a view to relief from forfeiture.

Sloman v. *Walter* (2), before Thurlow L.C., is a leading though not the earliest case. There the object of the penalty was to secure the use of a room in a house, and the plaintiff asked for an injunction to restrain proceedings at law for the penalty pending the trial of an issue quantum damnificatus, the direction of which was part of the relief prayed. A common injunction was granted, and on the coming-in of the answer Lord Thurlow continued the injunction to the trial.

Cases of this kind were very numerous. The Court did not send them away to common law, but granted an injunction and directed an issue of quantum damnificatus, and on the return of the issue relieved from forfeiture on payment of

(1) (1873) L. R. 8 Ch. 1022. (2) (1784) 1 Bro. C. C. 418.

damages and costs. It might have been expected that any one endeavouring to shew that damages only are recoverable for breach of an agreement to make a money payment would have produced some instance of an issue quantum damnificatus directed in such a case, or some decision, or at the very least some authoritative dictum to the effect contended for; but the authorities actually referred to are uniformly opposed to the contention.

Passing by the weighty and authoritative remarks of Lord Mansfield in *Bonafous* v. *Rybot* (1), quoted in the judgment of the learned judge in the Court below, which apparently were not required for the decision in that case, we may go at once to the case of *Farquhar* v. *Morris* (2), decided by the Court of King's Bench (Lord Kenyon C.J.). The question was, on what terms a penalty in a bond making no mention of interest, and not even fixing expressly a day for payment of the principal sum, was to be relieved against. The Court, in 1797, exercising the jurisdiction exclusively vested before the statute of Anne in the Court of Chancery, made the precise order which the Court of Chancery would have made; that is to say, they referred it to a master to compute principal, interest, and costs, so fixing the full amount recoverable on the bond, reckoning the interest from the date of the bond itself.

Neither before nor after that case has there been, so far as appeared by any authority cited to us, any question that in a case falling within the statute of Anne interest was to be computed, as opposed to damages being assessed.

In *Cameron* v. *Smith* (3) Bayley J., and in *Foster* v. *Weston* (4) Tindal C.J.—in answer in each case to a claim to have, in respect of a document not within the statute of Anne, interest and not damages—pointed out, as a reason for refusing the relief, that it was not a bond. This seems to me to be equivalent in each case to saying it is notorious that, in respect of a bond within the statute, interest is chargeable, but that is not the case here. In *Amos* v. *Smith* (5) Martin, Bramwell,

(1) 3 Burr. 1370.
(2) 7 T. R. 124.
(3) 2 B. & Ald. 305; 20 R. R. 444.
(4) 6 Bing. 709.
(5) 1 H. & C. 238.

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and Channell BB. held, or rather assumed as plain, that on a bond within the statute interest was chargeable. I am unable to see the relevancy of the cases cited for the purpose of shewing that interest beyond the amount of the penalty is not recoverable.

In *Amos* v. *Smith* (1) it was held that receipts given by a wife entitled for her separate use to the interest on a bond payable by her husband were sufficient evidence of payment of interest on the bond to take the case out of the Statute of Limitations, which is set up here, although no money actually passed. The Court pointed out that payment by the husband to the trustees, and by the latter to the wife, was not necessary.

The question is whether there is here anything which a court of equity would hold to be equivalent to the receipts given by the wife in *Amos* v. *Smith*. (1) Now, in equity, when a wife living in amity with her husband allows him to retain money which she might have insisted on having paid to her for her separate use, she is to be assumed to have given to him all arrears of income. *Caton* v. *Rideout* (2) is frequently cited as the authority for this proposition, but it only recognised, and did not lay down for the first time, the doctrine on which the Court proceeds. Here the wife was restrained from anticipation, and she could only acquiesce in the husband's retainer as from the date when the interest became due.

But even where there is no restraint on anticipation, the wife is only bound as to arrears. No presumption arises of an agreement to give to the husband future income. In this case the wife might, had she been so minded, have maintained by her next friend a suit against her husband and the trustees of the settlement to enforce the execution of the trusts of the settlement, and payment to her of the interest on the bond. To such a suit there would have been no defence, and it certainly would not have been the course of the Court to send her to common law as was suggested. If the advance of the money to the husband was for any reason a breach of trust, I should agree with what the Master of the Rolls has said on this point.

(1) 1 H. & C. 238. (2) 1 Mac. & G. 599.

There remains only the question of presumption of payment of the bond by reason of its being found in the husband's possession at the time of his death. But upon the evidence, having regard to the fact that during his life he himself was entitled to the interest for which he was liable, and would have been entitled to the income of any investment of the money arising from the discharge of the bond, I do not think that any such presumption arises. The case is totally different from one in which the obligor of a bond has, apart from the obligation, nothing to do with the obligee.

I do not think that there is any evidence of an appointment in the husband's favour by the wife under the power reserved to her by the settlement.

I am of opinion that the appeal fails and ought to be dismissed with costs.

COLLINS L.J. I am of the same opinion; but, in deference to the very closely-reasoned argument of Mr. Levett, I will add a few words.

It seems to me that the main question in this case is, Was this security as between the parties an interest-bearing security? If it was, then the presumption of *Caton* v. *Rideout* (1) applies, and it must be assumed that those payments of interest were properly made; and, therefore, that the statute does not run.

Now, we had a very interesting argument from Mr. Levett to the effect that when you have a bond for the payment of money upon a given day, and a penalty for non-payment, that is not an interest-bearing security; that the penalty merely settles the ultimate damages that can in any event be claimed for non-payment of the interest, but that, although upon proper proceedings taken, the obligor may be made liable to repay the principal sum and interest, that interest must be looked upon simply as an aliquot portion of the penalty which is, in its nature, damages; and that, though it is measured by interest, it really is damages; and that therefore there was no implication that this security was an interest-bearing security; in fact, that the principle of *Cook* v. *Fowler* (2) applied; and that there

(1) 1 Mac. & G. 599. (2) L. R. 7 H. L. 27.

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being nothing payable but damages, the implication in *Caton* v. *Rideout* (1) did not exist, there was no presumption of payment, and therefore the Statute of Limitations ran. But I think, when you come to analyze the state of the authorities as to bonds, it is clear that the sum payable on the bond, although there is a penalty, is not damages, but really is interest. And I think that is demonstrated by that fact to which attention was called by Mr. Haldane, namely, the distinction between a simplex obligatio—that is to say, a simple bond without a penalty—and a bond with a penalty. In the first case you have simply an absolute contract to pay upon a particular day, and for all practical purposes that is on the same footing as a deed secured by a warrant of attorney, which was the actual case before the Court in *Cook* v. *Fowler*. (2) In those two cases of a simple absolute contract to pay money on a given day there was no implication in law of any obligation to pay interest as a part of the contract after the given day. Interest, if recoverable, could only be recovered as damages, and can of course, now, by the statute of William, be recovered as damages. Now, what was it that differentiated the case of a bond with a penalty from the case of a bond without a penalty? You could not recover interest as interest upon a simple bond without a penalty; but you could unquestionably always in a court of equity, and afterwards, by the statute of Anne, in a court of law, recover, on a bond with a penalty, not damages, but interest. The explanation is that in the view of both Courts the penalty really was for the purpose of securing that which was the real contract, namely, the principal with the interest. There was, it is true, a difficulty in suing for the interest as interest in a court of law; but, when the statute of Anne was passed, the courts of law, as has been pointed out by my brother Rigby, were in a position to give effect to that which had always been the doctrine of equity. And in this particular case the mere machinery by which in a certain event the obligor could be made to pay interest appears to me to be quite immaterial. The point is, Was he under an obligation to pay interest and not damages? I think he was. And if that was

(1) 1 Mac. & G. 599. (2) L. R. 7 H. L. 27.

the position between these two parties, it was, as between them, an interest-bearing security; and, being an interest-bearing security, the statute will not run.

But, apart from that, since this bond was for six months an interest-bearing security and was retained afterwards by the husband with full knowledge of the trusts of the settlement, and as the money secured by it was borrowed by him, as it expressly states, as part of the trust funds, and as he then kept it but without paying any interest upon it, it seems to me that the case is undistinguishable from *Spickernell* v. *Hotham* (1), before Wood V.-C. In that case the third point decided, as stated in the head-note, was this: "In 1825, A. borrowed from the executors in trust of a will, a fund which was thereby bequeathed to them in trust for himself for life and then for other persons, and gave to them a promissory note for the repayment of this sum to them 'as executors in trust' with lawful interest:—*Held*, that A. borrowed the fund and promised to repay it as trust money, and therefore that lapse of time was no bar to the claim against him for repayment." Stress was laid there by the Vice-Chancellor on the fact that A., that is, Drury, borrowed the fund as trust money; and he says this (2): "But I think that Drury in this case must be taken to have received these moneys into his hands as trust moneys. It is argued, that there was no power to lend the trust moneys in such a manner; but, in the absence of evidence, the assumption is the other way. If I could not assume that there was such a power, I should be obliged to hold, that Drury received this money in breach of, and subject to, the trust, and then the circumstance of his being tenant for life would be important as to the question of laches; for the fact that he was entitled to receive all the income during that period would be some reason for not applying to him for payment of the principal, and, therefore, would be a ground for now arguing that the claim was not barred." Then, in answer to the argument put by Mr. Chandless and Mr. Messiter, who distinguished the cases that had been referred to, and argued that there could be no trust, for it was not shewn that there was any power to lend

(1) Kay, 669. (2) Kay, 677.

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the fund upon personal security, the Vice-Chancellor says: "This was borrowed as trust money, and was to be repaid to the lenders as 'executors in trust' of the will."

Now, in the bond in this case we have precisely the same statement; for, on the face of the bond it is recited that the husband undertakes to pay, or cause to be paid, to the trustees under the settlement made on the marriage, and so on; and therefore we have exactly the same express assertion or admission on the face of the security that the obligation is to pay the money to the trustees as trust money. The present case therefore seems to me, on this point also, to be undistinguishable from *Spickernell* v. *Hotham* (1) and numerous other cases to the same effect which have been cited.

On these grounds I think the appeal fails.

I wish to add this: that I think Byrne J. was perfectly right in the distinction he drew, which I did not myself appreciate at first, between the case of a warrant of attorney, as in *Cook* v. *Fowler* (2), and the case of a bond. I think the distinction is that which I have already put: a simplex obligatio, and an obligation with a penalty; and I think that, when you analyze the distinction between those two, it is obvious that the decision in the House of Lords in *Cook* v. *Fowler* (2) does not cover the case of an ordinary bond with a penalty.

Solicitors: *Fallows & Rider, for T. H. Walford, Birmingham; Thomas White & Sons.*

(1) Kay, 669. (2) L. R. 7 H. L. 27.

G. I. F. C.

EARLE *v.* KINGSCOTE.

C. A.
1900
July 12, 13.

[1898 E. 1305.]

Husband and Wife—Unity of Person—Contract by Wife—Fraud by Wife—Tort—Liability of Husband—Practice—Action against Wife—Joinder of Husband—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.

Although a husband is not liable on his wife's contract, he is liable for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract and is the means of effecting or inducing it and is part of the same transaction. That liability, which existed before the Married Women's Property Act, 1882, is not affected by the Act, nor is the remedy of the party injured limited by the Act to the wife's separate estate, if any.

Thus, where since the Act a contract had been entered into by K., a married woman, with E., under which E. was to pay K. a sum of money in a certain event, and subsequently K. induced E. to pay her the money by a false representation that the event had happened, it was *held* (1.) by Byrne J., [1900] 1 Ch. 203, and by the Court of Appeal, that as the contract had not been induced by the fraud and was altogether independent of it, K.'s husband was liable to E. in damages for his wife's fraud; and (2.)

Held, by the Court of Appeal, that the Married Women's Property Act, 1882, did not exempt the husband from his liability.

Liverpool Adelphi Loan Association v. *Fairhurst*, (1854) 9 Ex. 422, *Wright* v. *Leonard*, (1861) 11 C. B. (N.S.) 258, on the first point, and *Seroka* v. *Kattenburg*, (1886) 17 Q. B. D. 177, on the second, approved of.

The expression "need not be joined" in s. 1, sub-s. 2, of the Act does not mean that, whenever a plaintiff is suing a married woman in contract or in tort, he "shall not" join the husband with her, but only that the joinder, which was formerly necessary, is now unnecessary if the plaintiff is seeking to obtain satisfaction out of the wife's separate estate alone.

APPEAL by the defendant Howard Kingscote from the decision of Byrne J. (1)

Latham, Q.C., *Elgood*, and *H. Stuart Sankey*, for the appellant. Upon the points argued in the Court below and discussed in *Liverpool Adelphi Loan Association* v. *Fairhurst* (2) and *Wright* v. *Leonard*, (3) we submit that if it is held that this is

(1) [1900] 1 Ch. 203. (2) 9 Ex. 422.
(3) 11 C. B. (N.S.) 258.

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really an action grounded on contract, as we say it is, and not an action grounded on tort, then the wife cannot be liable, and the husband is under no liability to damages for her torts. But a further question now arises upon the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). This point could not be taken in the Court below, because it had already been decided adversely to the husband by a Divisional Court of the Queen's Bench Division in *Seroka* v. *Kattenburg*. (1) It is submitted that that decision is wrong and should now be reconsidered, and that the effect of the Act is to render a husband no longer liable for his wife's tort. The foundation of the husband's former liability was the fact that his wife's property became his, and now that the wife is capable of holding her own property separately the foundation of the husband's liability is gone. A married woman may now sue alone for a tort committed before the Married Women's Property Act came into operation: *Weldon* v. *Winslow*. (2) Formerly the wife could not be sued without the husband for her tort; but if the wife died while the action was pending, it could not be continued against the husband, because there was no cause of action against him. He was joined merely for the sake of conformity. Now, under s. 1, sub-s. 2, of the Act (3), the wife can alone be sued for her tort and, as the sub-section says, her husband "need not" be joined, which is equivalent to saying he "shall not" be joined: that is because there is no cause of action against him. The old cases were founded on the following statement in Bacon's Abridgement, "Baron and Feme" (L): "The husband is by law answerable . . . . for all her [the wife's]

(1) 17 Q. B. D. 177.

(2) (1884) 13 Q. B. D. 784.

(3) Sect. 1, sub-s. 2, of the Married Women's Property Act, 1882, is as follows: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

torts and trespasses during coverture, in which cases the action must be joint against them both; for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending himself." That was recognised as a "universal rule" in *Capel* v. *Powell*. (1) The statement of Jessel M.R., in *Wainford* v. *Heyl* (2), that the wife is not liable for her general torts, but her husband is, is, we submit, not correct. Sects. 14 and 15 deal only with the wife's ante-nuptial liabilities. If it had been intended that the husband should be sued for the wife's post-nuptial torts the Act would surely have said so.

Levett, Q.C., and *W. Baker*, for the plaintiff, upon the point argued in the Court below, used the same arguments and referred to the same authorities as on that occasion. Here was a contract between two ladies, the plaintiff and the defendant, Mrs. Kingscote, that the plaintiff should lend money on a joint speculation in the purchase of shares. The defendant, Mrs. Kingscote, states falsely that she has bought the shares. That falsehood was the tort which gave the plaintiff a new cause of action quite independently of the contract; it was no part of the contract, and was not the means of effecting the contract, being in fact subsequent to it. Therefore the husband is not exempted from his common law liability for his wife's tort, for he comes within the old doctrine that husband and wife were for all purposes "but one person in law": Littleton, s. 29. *Capel* v. *Powell* (1) merely decides that when the marriage tie is dissolved the husband and wife become separate persons. The legal status of husband and wife is not altered by the Married Women's Property Act, 1882; it is not the fact that the Act destroys the old legal unity of person. The authorities are clear that all the Act does is, not to alter the status of a married woman, but only to affect her property; it gives new rights to the husband and new rights to the wife, and new remedies against one another; it does not abrogate or infringe any existing principles or rules of law in cases to which it does

(1) (1864) 17 C. B. (N.S.) 743, 748.
(2) (1875) L. R. 20 Eq. 321, 324.

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not apply: *Butler* v. *Butler* (1); *In re Jupp* (2); *Seroka* v. *Kattenburg*. (3)

Latham, Q.C., in reply.

LORD ALVERSTONE M.R. The facts of this case may be very simply stated. In July, 1898, the defendant, Mrs. Kingscote, induced the plaintiff, Mrs. Earle, to enter into a contract with her for a joint speculation in certain shares upon her, Mrs. Kingscote's, representation that thereby she would be able to repay to Mrs. Earle a certain debt, and that she would be responsible for any loss the plaintiff might incur. That bargain having been made, Mrs. Kingscote telegraphed to the plaintiff falsely stating that she had bought the shares, and, on the faith of that telegram, the plaintiff sent her back 2000*l*. The question is whether that transaction is such that no action could have been brought against the husband of Mrs. Kingscote either before the Married Women's Property Act, 1882, or since, on the ground that the fraudulent representation was so connected with the contract that the action would not lie against the husband, and that the contract could not be turned into a tort. Byrne J. has considered that the law as laid down in the authorities to which he referred "must be limited to cases in which the fraud is not only directly connected with the contract, and parcel of the same transaction, but is also the means of effecting (in the sense of obtaining) the contract." In my judgment, Byrne J. rightly laid down the principle established by the authorities, and has properly applied it to the facts of this case. No doubt the line may in some cases be difficult to draw, and it is easy to see that in many instances the fraudulent representation may be such that it could easily be turned into an action upon an implied warranty; but in this case I think the distinction is correctly pointed out by Byrne J.'s judgment —that here there was an existing contract between Mrs. Earle and Mrs. Kingscote, and that, supervening upon that, there was a transaction whereby, by means of a fraudulent and false representation, Mrs. Earle was induced to part with 2000*l*. I

(1) (1885) 14 Q. B. D. 831, 835-6. (2) (1888) 39 Ch. D. 148, 152.
(3) 17 Q. B. D. 177.

think it would be narrowing the law too much if we were to hold that the husband was not liable in such a case.

Mr. Latham criticised such an expression as "inducing the contract"; but I think, when the authorities are looked at, the principle has been laid down for nearly fifty years. The language of the judgment in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) is this: "When the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible." And when that case came to be considered in *Wright* v. *Leonard* (2), Willes J. (who had been counsel in the *Liverpool Adelphi Case*) practically reaffirmed the same view of the law.

I come to the conclusion in this case that the representation was not the inducement of the contract; that it was not the means of effecting the contract; and that it must be regarded as an independent representation in respect of which the husband would have been liable before the Married Women's Property Act.

It was then contended by Mr. Latham that all this law is swept away by the Married Women's Property Act, and that now a husband is not liable in respect of his wife's torts committed either after the marriage or before. He did not dispute that *Seroka* v. *Kattenburg* (3), decided by my brother Mathew J. and my brother Smith J., is an authority against his contention; but he asks us to overrule it. Not only is the judgment in that case, in my opinion, quite right, but I should have come to the same conclusion if there had been no authority to guide us. Sub-s. 2 of s. 1 of the Married Women's Property Act says that the husband "need not be joined" with the wife either as plaintiff or defendant. The reason for those words is, to my mind, pretty obvious. Here is an enactment altering the law by making a married woman capable of suing and being sued as if she were a feme sole, and accordingly the words "need not be joined" were intended to get rid of the old obligation to join the husband in such cases.

(1) 9 Ex. 429. (2) 11 C. B. (N.S.) 258.
(3) 17 Q. B. D. 177.

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But Mr. Latham says it is involved in that, that the husband *shall* not be joined; but the consequence of such a view of the law would be so serious that nothing short of express words would be sufficient to take away the husband's liability. I do not think it is necessary to consider whether the foundation of the rule which made the husband liable is to be found in the principle stated by Mr. Levett, to which I should not be disposed altogether to assent—namely, that for all purposes the husband and wife were to be treated as one person—or in the principle stated by Mr. Latham, that it was a mere question of procedure and that the husband was joined for the sake of conformity; but, at any rate, in the year 1882 it had been established for many years that, whether the wife had a separate estate or not, an action would lie against the husband during his lifetime for his wife's tort. Accordingly, where the wife had separate estate, the Act provided the practical remedy that in that case the wife might be sued without the husband for her tort, whether the tort was committed before or after the marriage. Sects. 14 and 15, as Smith J. pointed out in *Seroka* v. *Kattenburg* (1), expressly deal with torts before marriage and limit the liability of the husband, in that case as well as in others, to the separate estate coming to him by virtue of the marriage. I think it would be a very strong thing to say, there being no words in the statute dealing with torts after the marriage, that, under the words "need not be joined" in sub-s. 2 of s. 1, the liability of the husband was taken away. *Seroka* v. *Kattenburg* (1) is, in my opinion, good law, and for that reason I think the point raised on the Married Women's Property Act does not avail the appellant in this case, and this appeal must therefore be dismissed.

RIGBY L.J. I am of the same opinion. The representation actually made by the wife in this case was a false representation, and to my mind it did not induce any contract at all. It only induced the plaintiff to suppose that the occasion on which the contract would involve her sending money had arrived, although in fact it had not. Therefore, on that ground, I think the learned judge was right in saying that this would not fall

(1) 17 Q. B. D. 177.

within those cases where a misrepresentation has induced a contract and the contract is, as a matter of fact, founded on the misrepresentation.

As to the construction of the Married Women's Property Act, I have had considerable doubts, not now for the first time, but over and over again; and I doubt whether, after any amount of consideration, I should come to a perfectly clear conclusion as to what was meant. I think it safer, therefore, to say I cannot find the very words which would release a husband from a liability which at common law he was subject to; and therefore I think it better, as the lesser of the two difficulties, to say it was not intended that he should be released. To say that the Act has in effect provided, by the 1st sub-section of s. 2, that the husband "shall" not be joined is not accurate: he "need not be joined" in a case in which the plaintiff chooses to avail himself of the new right of proceeding against the wife, in order to obtain satisfaction out of her separate property; but the language of the sub-section does not, I think, authorize us to say that it was intended to apply generally.

COLLINS L.J. I am of the same opinion on both points. I think Byrne J. has correctly applied the law as laid down in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) on the one hand, and *Wright* v. *Leonard* (2) on the other. Those two cases seem to me to exactly define the distinction which Byrne J. has made the ground of his decision in the present case. The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture; I need not deal with antecedent torts. That being so, a qualification was put on that rule so far as regarded fraud or other torts embraced in contracts. It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability

(1) 9 Ex. 422. (2) 11 C. B. (N.S.) 258.

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of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort. You cannot let in the liability of the husband by turning that which is essentially contract into tort in the mode stated. But that principle certainly does not and ought not to apply where the real substance and gist of the matter is in fact a tort and would naturally and properly be expressed as a tort, though by ingenuity it might be framed into a statement of a contract—a contract which in point of fact never really existed, but which would be alleged as an academical statement by an ingenious pleader so as conceivably to cover the circumstances of the case. Now, the two cases to which I have referred afford very good illustrations of the dividing line. You have in the first case, the *Liverpool Adelphi Case* (1), a contract entered into upon a false and fraudulent representation, but in that case the fraudulent representation was, or at all events was treated by the Court as being, the basis of the contract; and it being the basis of the contract they held that the remedy was in contract and not in tort, the result of which was that there was no remedy at all against the husband.

Then came the case of *Wright* v. *Leonard* (2), in which the judges differed in opinion. Two judges thought the case was covered by the preceding case, and that the false representation was the basis of the contract and was directly connected with it within the principle of the earlier case, and was the means of effecting the contract. The other two judges pointed out that, taking the "declaration" (as it was then called) and reading it fairly, it did not disclose a contract at all between the wife who made the representation and the would-be discounter who acted upon it. The person who was asked to discount a bill purporting to be accepted by the lady's husband asked the lady whether the signature was that of her husband. She said it was. Those two judges regarded that, rightly or wrongly in the circumstances of that case, as a fraud not inducing the contract, but as coming in after the contract and separable from it. They guarded themselves by saying that if it should turn out, when the case came to be tried, that there was really a contract

(1) 9 Ex. 422. (2) 11 C. B. (N.S.) 258.

based upon fraudulent misrepresentation, then, and not till then, it would come within the decision of the earlier case.

Now we come to the case before us, which lies beyond all question on the other side of the dividing line laid down in *Wright* v. *Leonard*. (1) There was room for considerable doubt on which side of the line that case came; but in this, as has been pointed out by my brother Rigby, a contract had been unquestionably made between these two ladies. That contract embraced certain obligations on the one side and on the other, and existed entirely independently of the fraud. The fraud had nothing to do with inducing the parties to enter into the contract. Then came the performance of the obligation; and at that stage, when on the happening of a certain event an obligation would fall on one of the parties, the defendant, Mrs. Kingscote, by a false and fraudulent representation that the event had happened, made it appear that the time at which under the contract the plaintiff was to pay the money had arrived. All that the contract afforded in this case was a convenient opportunity to the defendant to commit a fraud if she were so minded: it had no other relation to the fraud. The fraud might have been committed altogether independently of the contract, and, therefore, it seems to me that in this case the fraud is distinctly separated from the contract, and can in no sense be said to be the means of effecting it. If you try to introduce the principle that fraud in this case was part and parcel of the contract, and the means of effecting it, you must necessarily leave out all the original arrangements between the parties that formed the only contract between them. You must begin your consideration at the date when the defendant telegraphed to the plaintiff stating as a fact that she had bought shares which in fact she had not bought. If you are going to turn a statement, false in fact and followed by acts on the part of the plaintiff, into contract, I am unable to see, and counsel were unable to suggest, any form of fraud or fraudulent misstatement of facts, followed by any act on the part of the person to whom they were made, that might not, to some extent, as in the instance before us, be shaped into the form of contract.

(1) 11 C. B. (N.S.) 258.

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If that were so, the effect would be to simply wipe out fraud as one of the torts for which the husband would be liable if the wife committed it. That seems to me impossible, having regard to the great strength of the authorities from very early times, which have laid down that the husband is liable for the fraud as well as for other torts of the wife. It seems to me that the only principle which can be found in relation to fraud and contract is the principle which was laid down in the *Liverpool Adelphi Case* (1)—the principle that has been acted upon by Byrne J., namely, that "when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife." That principle seems to me to be the right principle, and it excludes the case before us. Therefore, I think Byrne J. was perfectly right on that point.

Now, on the other point, as to the effect of the Married Women's Property Act, it seems to me that I cannot usefully add anything to the decision of the Court of Appeal in the case of *Weldon* v. *Winslow* (2), and the judgment of the Divisional Court in *Seroka* v. *Kattenburg*. (3) Those cases seem to put the question beyond reasonable doubt, and, but for the hesitation of my brother Rigby, I should have thought it perfectly clear that the Married Women's Property Act does allow a married woman to be treated as a feme sole for certain purposes only, and gives her rights in respect of her separate property, and imposes liability upon her in respect of her separate property. It also relieves the husband from his common law liability for her torts and contracts made before marriage to the extent to which he takes a benefit from her property by the marriage. But, having done that, the Act leaves things as they were, and it is not the case that a person who has been injured by the wife's tort, committed during coverture, and who knows that the wife has no separate property, is now by the operation of this Act limited to an action against her in respect of her separate estate—a separate

(1) 9 Ex. 429. (2) 13 Q. B. D. 784.
(3) 17 Q. B. D. 177.

estate which perhaps does not exist. In my judgment the Act, in giving that person a right against the wife's separate estate, which may or may not exist, has not deprived him of the right to proceed against the husband in respect of a tort committed by her. It seems to me that the law is reasonably clear on that point, and that the appeal ought to be dismissed.

Solicitors: *Powell & Burt; Fraser & Christian.*

G. I. F. C.

In re HUGHES AND ASHLEY'S CONTRACT.

[1899 H. 3449.]

Vendor and Purchaser—Contract, Validity of—Question arising out of Contract—Conveyance, Form of—General Words—Parcels—Summons—Specific Performance—Vendor and Purchaser Act, 1874 (37 & 38 *Vict.* c. 78), *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 6, *sub-s.* 2.

Although upon a summons under s. 9 of the Vendor and Purchaser Act, 1874, evidence is adduced tending to throw a doubt upon the existence or validity of the contract itself, that does not preclude the Court from deciding on the summons a specific question arising out of or connected with the contract as it stands, such as a question with regard to the vendor's right to limit, in the conveyance, the operation of the general words in s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881. It is the duty of the Court to deal with such a question on the summons, irrespective of the question whether the contract is one that can be enforced or not.

APPEAL from Kekewich J.

On April 26, 1899, certain freehold property near Hereford was put up for sale by auction in two lots. Lot 1 belonged to a Mrs. Hughes, and consisted of a field upon which were a well and pump. Lot 2 adjoined lot 1 and belonged to Mrs. Hughes and two other persons as tenants in common. It consisted of a field with a row of six cottages thereon known as "Railway Terrace," and by permission of Mrs. Hughes and her predecessors in title the tenants of these cottages had been in the habit of drawing their water-supply from the pump and well on lot 1, and for that purpose, as well as for access to a

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road at the end of that lot, using a roadway or footpath that skirted two sides of that lot.

Lot 1 was not sold at the sale, but lot 2 was knocked down for 450*l.* to George Edward Ashley, who thereupon paid his deposit and signed the contract as purchaser, subject to the particulars and conditions of sale. Condition 6 stated that "the property is sold subject to all rights of way and water and other easements (if any), land tax, tithes, tithe commutations, and to all tenancies from year to year, or for any less period, whether mentioned in the particulars of sale or not."

The purchaser's solicitors having accepted the vendors' title sent their solicitors for approval a draft conveyance in the statutory form under the Conveyancing and Law of Property Act, 1881. The draft proposed to include a grant of a right of way from the road at the end of lot 1 in a direction marked on a plan across the middle of that lot, and also of the use of the pump and well on that lot. The vendor, Mrs. Hughes, altogether denied the purchaser's right to any grant of the use of the pump and well, but she admitted that he was entitled to a grant of a right of way over the existing road along two sides of lot 1, though not to any right of way across the middle of that lot, since, as she alleged, that would spoil the lot for building purposes. Her solicitors accordingly altered the draft conveyance by striking out the grant of the right of way across the middle, and substituting a grant of a right of way over the roadway along the two sides, "Together also with all erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or appurtenant to the said hereditaments or any part thereof, and so that this assurance shall not, by virtue of s. 6 of the Conveyancing and Law of Property Act, 1881, include or operate as a grant or assurance of any right or easement whatsoever not hereby expressly conveyed." The draft as so altered was then returned to the purchaser's solicitors.

The purchaser, however, insisted that a path across the middle of lot 1 from the cottages was an important mode of access to them, and also that the use of the pump and well

was necessary for providing a water-supply for the cottages; and that unless he could have a right of way directly across lot 1 he must either decline to purchase or insist on compensation. The parties being unable to agree upon these points, the vendors took out an originating summons under the Vendor and Purchaser Act, 1874, asking (1.) that it might be declared that the purchaser was not entitled to have a conveyance in the terms of the draft prepared by his solicitors, but that the vendors were entitled to have inserted in the conveyance, after the description of the parcels, general words in the restrictive form above quoted; and (2.) that the purchaser was not entitled to have included in the conveyance a grant of a right of way over lot 1 in the defined line he proposed, but that the vendors were entitled to define the position in which the right should be exercised.

At the hearing before Kekewich J., on January 13, 1900, there was read a joint affidavit by the purchaser and by his solicitor —who also appeared to be the solicitor for one of the vendors other than Mrs. Hughes—deposing that when lot 2 was being put up for sale the auctioneer stated in reply to various questions on the subject that the purchaser would have the right to use the pump and well on lot 1; and the purchaser further deposed that he bought lot 2 on the faith of that statement. The purchaser also insisted in his affidavit on the inconvenience of the circuitous right of way offered by the vendors as compared with the direct way across the middle of lot 1; and he said that if he was deprived of the use of the well and pump, and was confined to the circuitous right of way proposed by the vendors, he should be compelled either to decline to purchase or to insist on compensation being given by the vendors. Mrs. Hughes denied having given the auctioneer any authority to make the statement alleged. An objection was then taken on behalf of the purchaser that that was a question "affecting the existence or validity of the contract," and that therefore the Court could not decide the specific questions raised by the summons. Kekewich J. thereupon dismissed the summons with costs, saying he could not, on that summons, go into the merits of the dispute as to the statements alleged to have been

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made by the auctioneer, but that such statements should be given in evidence, in the usual way, in an action for specific performance.

Mrs. Hughes and another of the vendors appealed, the third not concurring in the appeal.

Neville, Q.C., and *Elgood*, for the appellant vendors. We submit that the learned judge took a wrong view in holding that as a question was raised as to the validity of the contract he could not, on this summons, under s. 9 of the Vendor and Purchaser Act, 1874 (1), express an opinion upon its construction: that is opposed to *In re Lander and Bagley's Contract.* (2) The learned judge himself held in *In re Wallis and Barnard's Contract* (3) that, as in the present case, an isolated point on the form of conveyance might be dealt with on a summons under the Act, even though the respondent might have a right to rescission. Here the question is simply whether the purchaser is entitled to have in his conveyance the benefit of the general words in s. 6, sub-s. 2, of the Conveyancing Act, 1881. That is a question of the construction of the contract; and if those general words extend, as we say they do, beyond the terms of the contract, the vendors are entitled to have them limited: *In re Peck and School Board for London.* (4) The words "with the appurtenances" do not pass a right of way to the land sold which a vendor has used over adjoining land of his own, unless expressly stipulated for by the contract: *Bolton* v. *Bolton.* (5) As regards the use of the pump and well, even if the auctioneer did make the statement referred to—

(1) Sect. 9 of the Vendor and Purchaser Act, 1874, is as follows:—

"A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid. . . . "

(2) [1892] 3 Ch. 41.

(3) [1899] 2 Ch. 515.

(4) [1893] 2 Ch. 315.

(5) (1879) 11 Ch. D. 968.

which we do not admit—he had no authority from us to make it.

[COLLINS L.J. referred to *Kay* v. *Oxley*. (1)]

Renshaw, Q.C., and *T. Ribton*, for the purchaser. The question is, Is this contract enforceable or not? The purchaser asserts that he bought upon the faith of an express representation by the auctioneer, the vendors' agent.

[RIGBY L.J. You cannot go into the merits on a summons of this kind.]

The object of the Vendor and Purchaser Act, 1874, was to place parties proceeding under it in the same position as they would have been under the old form of decree establishing the contract: *In re Burroughs, Lynn and Sexton*. (2) But the real question is whether this contract can be enforced or not; and until that is decided, it is useless to settle the form of conveyance. We say that there is something outside this contract which prevents the vendors from enforcing it, and therefore they are not entitled to come on a summons at this stage. *In re Scott and Alvarez's Contract* (3) illustrates the inconvenience of deciding a question on the contract upon summons when it might turn out that there was no binding contract at all. Until it is ascertained what the contract is—a contract which we say is not binding—it is impossible to decide the form of conveyance. What s. 9 of the Act says is that the judge shall make such order "as to him shall appear just"; that is to say, he shall do justice between the parties on the footing that the contract is existing and binding. Here the vendors are either bound by the representation of the auctioneer or they must rescind the contract. Misrepresentation, even if innocent, leading to a contract, entitles the purchaser to rescission: *Derry* v. *Peek*. (4)

Elgood, in reply.

LORD ALVERSTONE M.R. This is an appeal from a decision of Kekewich J. upon a summons under the Vendor and Purchaser Act, 1874. There were two questions raised on the

(1) (1875) L. R. 10 Q. B. 360.
(2) (1877) 5 Ch. D. 601.
(3) [1895] 2 Ch. 603.
(4) (1889) 14 App. Cas. 337, 359.

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draft conveyance; but they were not decided, Kekewich J. having dismissed the summons. It was not seriously disputed by Mr. Renshaw that, if the contract was to stand, the purchaser could not insist upon having a conveyance in the form which he tendered; but he said that the vendors ought not to be allowed to raise the question as to the form of conveyance, because the purchaser, if an action for specific performance were brought against him, would raise a serious question as to the validity of the contract, at all events with regard to the statement said to have been made at the sale by the auctioneer as to the supply of water. A question also arose, when the parties came to discuss the form of conveyance, as to a right of way over the adjoining piece of ground; but I do not think that the discussion of such a question was so inconvenient as to justify the learned judge in dismissing the summons. In my opinion the learned judge went too far; and indeed he went further than his own decision in *In re Wallis and Barnard's Contract.* (1) There are many passages in Chitty J.'s judgment in *In re Lander and Bagley's Contract* (2), shewing that although a question may be raised as to the validity of the contract as it stands, yet questions as to the construction of the contract ought to be determined. I think it would be very inconvenient to hold that, where the parties have been acting on the footing of there being some contract between them, exchange drafts, endeavour to agree upon the form of conveyance, and then one party, either vendor or purchaser, takes steps for settling the point in dispute on a summons under the Vendor and Purchaser Act, 1874, the summons should be dismissed simply because upon the hearing the other party says, "I am going to raise the question whether there is a contract at all," and so endeavours to oust the jurisdiction of the judge under that Act, so that he is bound to dismiss the summons. I quite agree that, if the only question raised is one affecting the validity or the existence of the contract, that is not a proper question to be decided under s. 9 of the Act, having regard to the exception contained in that section, but it cannot properly be said that such is the case here. As regards the

(1) [1899] 2 Ch. 515. (2) [1892] 3 Ch. 41.

claim of the purchaser to have a right to draw water from the well, that no doubt may depend upon what was said in the auction-room; but when we come to the question of the right of way, it is impossible to hold that the question of the rights which the purchaser was entitled to have under the form of his conveyance was "a question affecting the existence or validity of the contract." The purchaser tendered a conveyance in a form which would give him the rights under s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881. On the conveyance being tendered in that form, the vendors said, "No; you are not entitled to all that s. 6 would give you, and we will indicate what we are prepared to give you under the contract." I think that is a question which it is to the advantage of the parties to have raised and determined, and which ought to have been decided by Kekewich J., namely, whether or not the purchaser could insert in the conveyance such a grant of rights of way as is provided for by s. 6, sub-s. 2, of the Conveyancing Act. If the whole question in the case had been whether the contract could stand, having regard to the representation made at the sale as to the right to a supply of water, there might have been more doubt; but I think that, having regard to the questions raised by this summons, Kekewich J. ought to have heard and determined those questions, and that this appeal ought to be allowed, with costs.

RIGBY L.J. In my opinion, it is proper and convenient that we should decide, upon this summons, this question of the right of way, and in my judgment Kekewich J. ought to have dealt with it. The matter has proceeded so far under the contract that the purchaser has tendered a form of conveyance; and if that form were adopted, it would follow that he would become entitled to the advantage of every word in s. 6, sub-s. 2, of the Conveyancing Act. It was therefore essential, from the point of view of the vendors, that the general words used should not have the effect of attracting that section; and, notwithstanding all that has been said, I cannot see that there is any objection to the words introduced by the vendors in the alternative. It is alleged that there are two roads, one which

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was actually in use and going round lot 1, and the other, proposed by the purchaser, going right through the centre of that lot. No easement existed as to either of them in connection with lot 2. The vendors were willing to grant the use of the existing road, and it is clear that only one road is necessary for the use of the cottages purchased. It would be a luxury to have two roads, though one might be a little nearer than the other; and I cannot see upon what ground the purchaser can insist upon having two roads. In my opinion the words introduced by the vendors granting the use of the existing road must be allowed, and therefore the claim of the vendors that they are entitled to define the purchaser's right of way over lot 1, the property that was not sold, must succeed. I say nothing at all about the pump and well. As to whether the statement was made in the auction-room or not, and whether there is in fact a valid contract, I do not think we are competent to entertain either of those questions upon this summons. We are absolutely unable at present to go into the merits of the case. There may be a ground for an action for rescission; but, however that may be, we cannot enter into the merits, but must leave them to be determined thereafter by an action.

All that we now decide is that if there is to be a conveyance, it should be in the form we have indicated.

We were referred to the case of *In re Scott and Alvarez's Contract* (1), in which the purchaser raised the question whether the vendor had any title to sell at all, and the Court of Appeal determined, when the case first came before them, that on the facts then before the Court a good title according to the conditions and terms of the contract had been made out. Subsequently, further investigation was made into the title, and it was found out that a blot apparently covered by the conditions of sale really did conceal an absolute and entire defect of title of such a nature that the vendor could not give even what is called "a holding title." It was said that the purchaser got liberty to bring an action notwithstanding the Vendor and Purchaser Act. At any rate he got the sanction of the Court to raise the

(1) [1895] 1 Ch. 596; [1895] 2 Ch. 603.

question whether, having regard to the defect of title, the vendor could enforce specific performance at all. Then followed, as a matter of course, in my view and in the opinion of the Court of Appeal, that, under the circumstances, it would be quite wrong to direct specific performance against the defendant, and that the parties must be left to their remedies at law.

COLLINS L.J. I am of the same opinion. I think the Court is bound to give effect to the policy of the Vendor and Purchaser Act, 1874, which gives suitors a cheap and easy method of obtaining a decision on points which may arise in carrying out contracts, instead of the parties being put to the expense of an action for specific performance. In my opinion, it would be a great misfortune if the parties were put to the larger expense entailed by an action for specific performance, and were to be debarred from getting rid, by means of a summons under the Act, of incidental points which would previously have had to be settled by action.

Now, in this case, there are, as I think, very substantial points arising out of the contract which the parties were entitled to raise; and it appears to me that the learned judge went too far in declining to exercise his jurisdiction under the Act. His absolute refusal to hear those questions discussed culminated in the dismissal of the summons. One point raised was an important one, and one which might possibly have an important influence in any action that might be brought to enforce the contract. Another point was whether, under the contract, the purchaser was entitled to have inserted in his conveyance the general words of s. 6, sub-s. 2, of the Conveyancing Act, 1881, with regard to way-leaves, and so forth. That he was entitled to some right of way through the vendors' adjoining land, there is no doubt; but I think it is clear that the general words in the Act would entitle him to more rights than he was entitled to under the contract. He is entitled to one right of way, but as a matter of fact he claimed two roads over the adjoining land of the vendors. There was one of them passing through the land of the vendors which might possibly be said to come under the words "enjoyed therewith."

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He was entitled to one of the roads, but not to both. That appears to me to be a substantial point arising out of the contract, and I see no reason why the Court should not deal with it. It is said that the point is not worth deciding because in the last resort the vendors might be prevented from enforcing specific performance. The very point arose in *In re Lander and Bagley's Contract* (1), before Chitty J., who held that, although possibly the contract might not be enforced, that did not relieve him from the obligation of deciding a question upon it. It seems to me that the same thing may be said in this case as in that. Here it is said that the defence to an action by the vendors for specific performance would be, first, that there was a representation disentitling the vendors to specific performance, and secondly, that there was a representation of a nature that gave the purchaser the right to rescind. But the present question of the right of way is one that depends upon the construction of the contract as it stands; and I think the learned judge went too far in declining to decide that question, and that the vendors were right in making their application. I also agree with my learned brethren in the distinction they drew as to the particular right of way to which the purchaser is entitled.

With regard to the other question, the right to use the pump and well, I agree that we cannot deal with it on this appeal, as it is "a question affecting the existence or validity of the contract," and therefore cannot be the subject of a summons under s. 9 of the Vendor and Purchaser Act, 1874. The learned judge was therefore right in refusing to decide that question on the summons.

Solicitors: *Shirley W. Woolmer, for Winterbothams & Gurney, Cheltenham; Starling & Wright, for H. C. Beddoe & Son, Hereford.*

(1) [1892] 3 Ch. 41.

G. I. F. C.

CHAMBERLAIN'S WHARF, LIMITED *v.* SMITH.

C. A. 1900 July 18.

[1900 C. 2111.]

Trade Union—Restraint of Trade—Illegal Objects—Expulsion of Member—Jurisdiction of Court—Injunction—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4—*Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The rules of an association, called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers carrying on the business of warehousing tea in bond, provided (rule 11) that every member should charge on teas the respective rates and adhere to the terms and conditions specified in a schedule to the rules, and should not be at liberty to depart from them in any way, except that a discount not exceeding 10 per cent. might be allowed on the said rates. No other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement.

By rule 14, No subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member.

By rule 15, Any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee.

The committee passed a resolution expelling the plaintiffs for an alleged breach of the rules, and they brought an action against the members of the committee to restrain them from acting on the resolution, on the ground (inter alia) that the plaintiffs had not had an opportunity of being heard in their defence. Kekewich J. granted an interlocutory injunction:—

Held, on appeal, that the association was a "trade union" within the meaning of s. 16 of the Trade Union Act Amendment Act, 1876; that its objects were illegal independently of the Trade Union Act, 1871, and that s. 4 of that Act prevented the Court from directly enforcing the agreement between the members:

Held, also, that by granting the injunction the Court would be directly enforcing the agreement.

The injunction was accordingly dissolved.

Rigby v. *Connol*, (1880) 14 Ch. D. 482, followed.

That case is not inconsistent with and has not been impeached by *Swaine* v. *Wilson*, (1889) 24 Q. B. D. 252.

APPEAL by the defendants, who were the members of the committee of an association called the Tea Clearing House,

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against an injunction granted by Kekewich J. restraining the defendants, until the trial of the action or further order, from acting upon a resolution, passed by the committee on June 25, 1900, expelling the plaintiffs from membership of the association on the ground that they had committed a breach of the rules.

The objects of the Clearing House were—

"(1.) To give facilities to the wholesale trade in tea for the lodgment and transmission of warrants, delivery orders, carding, cording, and other orders to the various docks and warehouses from a central office.

"(2.) To provide a central clearing house or office where all such warrants and orders may be lodged instead of at the various docks and warehouses, and further to provide facilities for the return of warrants and other documents to the trade, and generally to avoid the necessity of the personal attendance of the trade clerks and others at the offices of the various docks, warehouses, wharves, &c.

"(3.) To ensure frequent and rapid transmission of documents thus lodged or returned, and to provide and afford facilities for answering inquiries and giving information relative to the storage, working or delivery of tea."

The following were the material rules:—

1. "Dock companies at present carrying on the business of warehousing tea in bond and tea warehouse keepers (including any company or partnership) at present carrying on the said business, and including Monastery Bonded Warehouse Company, Limited, and who undertake in writing to abide by and observe the rules and by-laws of the Clearing House for the time being in force, shall be entitled to become members of the Tea Clearing House. Every member, or company, or partnership represented, shall pay in advance on the 1st of July in each year an annual subscription of 20*l*."

2. "The affairs of the Clearing House shall be conducted by a committee of management, consisting of not more than eight persons, four of whom shall be members appointed by the said dock companies and four shall be elected in general meeting from the other members, by whom in general meeting vacancies

caused by retirement of any of their representatives shall be filled."

5. "The committee may acquire and take suitable offices and premises for the transaction of the affairs of the Clearing House, and may appoint and dismiss officers and servants and fix the amount of their remuneration. The committee may also from time to time make such by-laws not inconsistent with the rules for the time being of the Clearing House as they may think fit for the regulation of the Clearing House, and may from time to time rescind or vary the same."

10. "All expenses not covered by annual subscriptions shall be borne and paid by the members rateably according to the number of votes to which they are respectively entitled on a poll in the year during which such expenses become payable. Any surplus shall be, in the discretion of the committee, either divided among all the members in like proportion, or may be retained and invested in such manner as they may think fit."

11. "Every member shall charge on teas by ships reporting on or after the 1st day of July, 1888, and on new season's China tea arriving before that date, the respective rates, charges, and rents, and adhere to the terms and conditions specified in the schedule to these rules, and shall not be at liberty to depart therefrom in any way, subject to the following allowance, viz.: a discount not exceeding 10 per cent. may be allowed on the said rates, charges, and rents, or any of them, being importers' charges. No other discount, no money gratuities, and no advantages, direct or indirect, shall be offered or allowed by any member, or his agents or employés, to any merchant, broker, employé, agent, or other person, in connection with any matter or thing in anywise relating to the Tea Clearing House agreement; but any member shall be at liberty to allow any difference in premium on insurance of teas warehoused or deposited with him beyond 3*s.* 6*d.* per cent. per annum paid for the same goods if on an annual policy, or a proportionate difference according to tariff rate if on a short time policy. All payments under this latter head to be notified to the committee and entered in a book kept for the purpose, which shall be open at all times to the members."

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14. "No subscriber shall be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who is not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member."

15. "Any member or subscriber breaking or failing to observe any of the rules or by-laws of the Clearing House for the time being in force, shall be liable to expulsion from the Clearing House by resolution of the committee. An expelled member or subscriber may be readmitted on such terms as may be determined by the committee."

The plaintiffs alleged that the resolution expelling them had been passed without their having had a fair opportunity of being heard in their own defence, and on this ground the learned judge granted the injunction.

The defendants appealed.

Warrington, Q.C., and *Christopher James*, for the defendants. This association is a "trade union" within the definition contained in s. 16 of the Trade Union Act Amendment Act, 1876, which has been substituted for the definition contained in s. 23 of the Trade Union Act, 1871, and, that being so, the Court is prevented by s. 4 of the Act of 1871 (1) from entertaining this

(1) By s. 2 of the Trade Union Act, 1871, "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

By s. 3, "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

By s. 4, "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union:

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members; or

"(*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman

action, for by so doing it would be directly enforcing an agreement which comes within sub-s. 1 of s. 4, or one of the other sub-sections. Rules 11 and 14 of the association clearly bring it within sub-s. 1 of s. 4. The Court cannot "directly" enforce an agreement which is illegal because it is in restraint of trade, and the object of this action is "directly" to enforce an agreement of that nature: *Rigby* v. *Connol* (1); *Hilton* v. *Eckersley* (2); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3)

Moreover, in order that the Court may have jurisdiction over a voluntary association of this kind, it must be shewn that it has property in which the plaintiffs have an interest of which they have been deprived. This has not been shewn by the plaintiffs.

The only defect in the proceedings of the committee is that they did not in their notice to the plaintiffs specify the precise day on which they intended to deal with the complaint against them. This is not enough to shew that the proceedings were contrary to natural justice, or that the defendants were acting malâ fide: *Dawkins* v. *Antrobus*. (4)

Renshaw, Q.C., and *Stewart-Smith*, for the plaintiffs. The rules of the association are not in general restraint of trade; they do not go further than that which is lawful as between

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acting in conformity with the rules or resolutions of such trade union; or

"(*c*) To discharge any fine imposed upon any person by sentence of a court of justice; or,

"4. Any agreement made between one trade union and another; or,

"5. Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

By s. 16 of the Trade Union Act Amendment Act, 1876, the term "trade union" is defined as meaning "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act" (i.e., the Act of 1871) "had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

(1) 14 Ch. D. 482.

(2) (1856) 6 E. & B. 47.

(3) [1892] A. C. 25.

(4) (1881) 17 Ch. D. 615.

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members of the same trade. The agreement between the members is not void or voidable under s. 3 of the Act of 1871, nor does it come within s. 4.

This action is not brought to enforce the rules directly or indirectly, but to prevent the violation of the elementary principle that a man must not be expelled from a society without having the opportunity of being heard in his own defence. Unless a plaintiff is attempting to enforce an illegal rule, the fact that some of the rules are illegal is not a bar to such an action as this: *Swaine* v. *Wilson*. (1) The object of the Trade Union Acts was not to create a new illegality, but to relax the common law doctrine: *Collins* v. *Locke*. (2)

The subscriptions belong to the association, not to the individual members.

Sufficient information was not given to the plaintiffs either of the nature of the charge made against them, or of the day on which it was to be taken into consideration by the committee.

The association is a voluntary one, and a member can retire from it at any moment. In some of the decided cases a time was limited within which a member could not free himself from the rules.

Christopher James, in reply. The plaintiffs are really asking the Court directly to enforce the agreement. They are asking the Court to declare them to be entitled to the benefit of the rules and to enforce the application of the property of the association in accordance with the rules. This case is not like *Fisher* v. *Keane* (3), in which no notice whatever was given to a member of a club, and he was expelled behind his back.

The main objects of this association are clearly illegal. In each case the Court must consider whether the illegal restraint of trade is the main object of the association. In *Swaine* v. *Wilson* (1) the main objects were clearly legal.

LORD ALVERSTONE M.R. The main question raised in this appeal is one of considerable importance, namely, whether or not the action which the plaintiffs have brought against the

(1) 24 Q. B. D. 252. (2) (1879) 4 App. Cas. 674.
(3) (1878) 11 Ch. D. 353.

committee of the association is one which can properly be maintained, having regard to the Trade Union Acts. I will first consider what the nature of the association is. We are not bound by either the preliminary statement of its objects or by the rules taken separately; we must look at the two together in order to see what the real object and scope of the association is. Apart from formal matters such as notices, the amount of the subscriptions of members and the management of the business, the substantial essence of the association seems to me to be the arrangement contained in rule 11, whereby all the members agree to charge in respect of certain services to goods, such as landing, bulking, rent, &c., not less than a specified tariff, with a maximum discount of 10 per cent. And in order to ensure that there should be no evasion of that contract or bargain there is a provision in rule 11: "No other discount, no money gratuities, and no advantages direct or indirect shall be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement."

Another important provision is made by rule 14 [his Lordship read it], and then comes rule 15, with reference to which the present question actually arises, that any member or subscriber breaking or failing to observe any of the rules shall be liable to expulsion by resolution of the committee.

The question for our determination is, whether this agreement is one in respect of which the jurisdiction of the Court is limited by the Trade Union Acts, and whether the plaintiffs in the proceedings which they have taken are asking the Court to do that which the Trade Union Acts have said the Court shall not entertain. We must look at the language of the two Acts and consider whether, if I am right in the view which I take of the substance and essence of the association, this action is one which the Court can properly entertain. For many purposes trade unions are now perfectly lawful associations, and by the Act of 1871 the objections which could formerly be taken to them have been limited. [His Lordship read s. 3 of the Act of 1871, and continued:—]

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Lord Alverstone M.R.

Then we come to s. 4, which deals specifically with this matter, namely, how far the Court shall interfere to enforce such a class of agreements. For this purpose the important agreement in the present case is aptly described by s. 4, sub-s. 1: "Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed." And possibly sub-s. 3 also applies: "Any agreement for the application of the funds of a trade union," though in my opinion that sub-section does not directly bear upon the point I am now considering. There might possibly have been some doubt whether a society which imposed conditions with regard to the transaction of business was a trade union, and this doubt led to the passing of the Act of 1876, which by s. 16 further defines a trade union. [His Lordship read s. 16, and continued:—]

I was at first troubled by the point taken by Mr. Renshaw, that this action, brought to restrain the committee from expelling the plaintiffs from the association, is not a proceeding instituted with the object of "directly enforcing" the agreement between the members. But on consideration I think it is. The charge made against the plaintiffs was that they had offered a financial advantage to some one in contravention of the provisions of rule 11. The decision of Kekewich J. is in effect an order of the Court that the plaintiffs shall remain members for the purposes of those mutual obligations which rest on the members so long as they are members. It is said that a member can voluntarily retire at any time. But it is as members that the plaintiffs invoke the jurisdiction of the Court in order to restrain the action of the committee. In other words, the plaintiffs claim the aid of the Court in order to maintain their position as being entitled to rights in the character of members of the association. Looking at the substance of the matter, I think this action is a proceeding "instituted with the object of directly enforcing" the agreement contained and embodied in the rules of the association. And in my opinion we could not come to any other conclusion

without (I will not say overruling) but to a great extent limiting the decision of Jessel M.R. in *Rigby* v. *Connol.* (1) Undoubtedly one part of the claim made by the plaintiff in that case was to remain a member of a trade union—not to be turned out of it—he being entitled as a member to the benefits of the association, and Jessel M.R. expressly decided that those sections of the Act of 1871 to which I have referred were a bar to the proceedings, on the ground that the action was brought directly to enforce an agreement between members of a trade union for the application of its funds "to provide benefits to members." It is true that in that case the question arose under sub-s. 3 of s. 4 of the Act of 1871, but, if I am right in my view of the essence of this agreement, I think the same principle applies to a proceeding to enforce the terms of an agreement which falls within sub-s. 1 of s. 4. *Swaine* v. *Wilson* (2) certainly does not purport to decide anything contrary to *Rigby* v. *Connol* (1), which, indeed, was recognised by Lindley L.J. as a case in which the action could not be maintained unless it could be maintained independently of s. 3 of the Act of 1871, and the learned judge proceeded to point out that in *Swaine* v. *Wilson* (2) the rights of the plaintiff depended on rules, the main objects of which were quite outside the Trade Union Act, and were in no way touched by its enactments, and that the fact that some of the rules might be open to objection under the Act did not affect the main objects and scope of the association the benefit of which the plaintiff was seeking to obtain.

I come therefore to the conclusion that, whether the agreement between the members of this association is or is not open to objection (although in my view it is not for all purposes void), it is an agreement which the Court has no power to enforce. Consequently the chief objection which has been taken to the plaintiffs' proceedings must succeed.

I do not propose to deal with the other points which have been taken, because the first objection goes to the root of the whole of these proceedings, this being one of the matters in which the Court cannot properly exercise jurisdiction.

(1) 14 Ch. D. 482. (2) 24 Q. B. D. 252.

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The objection with which I have dealt is fatal to the proceedings, and the action ought not to be allowed to go on.

RIGBY L.J. As regards the interpretation of the Trade Union Acts, I agree with what the Master of the Rolls has said, and this I think closes all further discussion on the case. The Court can no more enter upon any discussion with regard to the proceedings of this society than it could if the society were totally illegal from beginning to end. I do not say it is, but the Act prevents the Court from interfering to enforce certain agreements connected with societies of this kind.

Now, what the plaintiffs really want is this. They say that, purporting to act under certain rules of the association which are no doubt illegal, the committee have passed a resolution turning them out of the association. They desire to be restored to their membership, and for that purpose to discuss the rules, on the footing of which the committee acted, and they ask the Court to decide this point. The Court has no jurisdiction to entertain the case, and the application ought to have been dismissed.

The other points which have been raised need not be discussed, because the Court cannot look into them. No injunction should have been granted, and I do not see what possible object there can be in continuing the action.

COLLINS L.J. I am of the same opinion. When the rules of the association are read as a whole, having regard not only to the initial statement of the objects but also to the machinery by which those objects are to be carried out, it is perfectly clear that it comes within the definition of a trade union contained in s. 16 of the Act of 1876—namely, "any combination, whether temporary or permanent, ... for imposing restrictive conditions on the conduct of any trade or business." Rule 11 really defines the true object of the society, and in my judgment that object clearly falls within the definition which I have just read. That being so, we are at once confronted with the prohibition of the Trade Union Act, 1871. Without differing in any way from what has been said by my learned

brethren, I think that the present case comes in terms within the decision in *Rigby* v. *Connol.* (1) Rule 10 provides that "any surplus shall be, in the discretion of the committee, either divided among all the members in like proportion, or may be retained and invested in such manner as they may think fit." A member who has been expelled from the society and who claims to be restored to his membership does, I think, claim a benefit from the funds of the association, and comes within these very words of Jessel M.R. (2): "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation." It seems to me that the facts of the present case bring it within those words, and that the plaintiffs' claim is clearly one of those which this Court cannot enforce. I agree, therefore, that the appeal must be allowed.

Solicitors: *Druces & Attlee; Rollit & Sons.*

(1) 14 Ch. D. 482.

(2) 14 Ch. D. 490.

W. L. C.

C. A.
1900
July 16, 23.

In re JOLLY.
GATHERCOLE *v.* NORFOLK.

[1899 J. 944.]

Will—Construction—Money owing for Rent—Landlord and Tenant—Set-off—Rent, Non-payment of—Adverse Possession—Absolute Title of Tenant—Extinguishment of Landlord's Title—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

Considered. MOSES v. LOVEGROVE [1952] 2 Q.B. 533

A testatrix gave her property among her four children, and directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had, in the lifetime of the testatrix, acquired an absolute title, under s. 1 of the Real Property Limitation Act, 1874, to a freehold farm which had been let to him by her, through non-payment of rent by him to her for more than twelve years. Upon the question whether the unpaid rent for the twelve years prior to the extinguishment of the estate of the testatrix in the farm ought to be deducted from the son's share:—

Held, by the Court of Appeal, reversing the decision of North J., [1900] 1 Ch. 292, that, under the Real Property Limitation Acts, 1833 and 1874, all the rights of the reversioner in the farm had become extinguished, and that therefore the unpaid rent was no longer owing to her estate, and should not be deducted from the son's share.

APPEAL by the defendant, R. T. Jolly, from the decision of North J. (1)

Vernon Smith, Q.C., and *A. H. Poyser*, for the appellant, used the same arguments as in the Court below and, in addition to the cases then cited, referred to *In re Alison* (2) as explaining the difference between the Statute of Limitations (21 Jac. 1, c. 16) and the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), the former destroying the remedy, and the latter the title. They also referred to *Nepean* v. *Doe* (3) and Dart's Vendors and Purchasers, 6th ed. p. 433, as shewing that the effect of the latter statute was to abolish the doctrine of non-adverse possession. They further contended that, under the Real Property Limitation Acts, 1833 and 1874, the title of the testatrix was absolutely extinguished at the end of the

(1) [1900] 1 Ch. 292.
(2) (1879) 11 Ch. D. 284, 295–6.
(3) (1837) 2 M. & W. 894; 2 Sm. L. C. 10th ed. p. 542; 46 R. R. 789.

twelve years: she then lost not only the right to the land itself, but also to that which issued out of it, namely, the rent. When the statutory title obtained by the appellant accrued, it put an end to any contractual relation that had previously existed between himself and the testatrix.

H. Terrell, Q.C., and *T. B. Napier*, for the plaintiffs, the executors and trustees, used the same arguments as in the Court below.

J. Rolt, for the defendant, the daughter of the testatrix.

Vernon Smith, Q.C., in reply.

Cur. adv. vult.

July 23. LORD ALVERSTONE M.R. The question in this case is whether the trustees of the will of Anne Jolly, who made a will in the year 1891 and died in December, 1898, are entitled, in dividing her property between her four children, to deduct from the share of the son, R. T. Jolly, any amount in respect of rent due for a farm occupied by him since 1868. In 1868 the testatrix let the farm to her son at a rental of 80*l.* a year. He paid the rent due up to the year 1881, and made no payment after that time. By her will made in 1891 Anne Jolly gave her property in trust for her four children, and declared (among other things) that all moneys owing to her at her death by any of her children for rent or otherwise should be brought into hotchpot, and that no child should be entitled to receive any share until such moneys so owing to the testatrix had been paid to her executors. North J. has decided that the executors should deduct from the share of R. T. Jolly twelve years' rent of the farm for the period 1881 to 1893. I am unable to adopt this view. In the year 1893 R. T. Jolly obtained, by virtue of the Real Property Limitation Act, 1874, s. 1, an absolute title to the property. It is, I think, inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Limitation Acts of 1833 and 1874 is, in my opinion, that, after the expiration of the statutory period of twenty and twelve years respectively, all rights which the reversioner would have had in respect of the land have come to an end; and I do not think that it would be consistent with

C. A. 1900 JOLLY, *In re.* GATHERCOLE *v.* NORFOLK.

that position that rent, the non-payment of which has given the occupier a title to the land, should still be deemed to be owing. I am, therefore, of opinion that this appeal should be allowed, and that the trustees are not entitled to deduct anything in respect of the arrears of rent.

RIGBY L.J. I am of the same opinion. A very ingenious argument has been addressed to us on behalf of the trustees. It was said that the Real Property Limitation Acts applied only to land, and that you must go to the statute of James as to a contract for rent. Then it was said that, although the Real Property Limitation Acts barred the remedy as to the recovery of the land, they did not bar the right to recover the twelve years' arrears of rent, and that the rent remained a debt and was capable of being set off. It is a very curious point, and it is not the less curious because more than half a century has passed since the statute of 3 & 4 Will. 4, c. 27, came into operation. I do not speak of the Real Property Limitation Act, 1874, because that Act only changes the period of limitation from twenty to twelve years. And although more than half a century has passed—and there must have been thousands of cases in which people have been bitterly disappointed by the loss of property through the operation of the Acts—yet no one seems to have ever brought an action for rent in a case where the Real Property Limitation Acts have operated. Nevertheless, such an action must have lain in all cases if the view of the trustees is right. Let us consider, however, what the usual practice of the profession has been. It seems to me to be plain that on the expiration of the twelve years all the rights of the owner of the land are determined. The right of action can only last during twelve years, and in the case of a tenancy from year to year the right of action is to be held to have first accrued when the last payment of rent was made. The landlord has a right of action if the rent is not paid. A landlord cannot eject the tenant until the day after the rent becomes due. The assumption is that on the day after the twelve years have elapsed the tenant is to be taken to be no longer tenant. He is holding the land under a title which, according to the older cases, would have been an adverse title. That is abso-

lutely inconsistent with an agreement to pay rent; and so it was held that the tenant was no longer in possession as a tenant from year to year, or as a tenant at all. That position is absolutely inconsistent with any right on the part of the late landlord to recover rent. In the present case the son who has been tenant was under no liability to pay rent after twelve years in the events which happened, he being no longer tenant at all, although, if he had been sued at any time before the expiration of the twelve years, it would have been quite a different matter: after the twelve years a new state of things arose. I am, therefore, of opinion that this appeal should be allowed.

COLLINS L.J. I am of the same opinion. I think the crucial point was that put by Mr. Poyser—namely, that the effect of the statute of William IV. was to do away with non-adverse possession, and to make all possession adverse. At the end of the twelve years the possession of a tenant who has paid no rent becomes adverse during the whole time the adverse possession is validated by the statute, and it is not competent for the landlord to say that he still retains the right to recover rent which was not payable to him. I think that is emphasised by the position of a tenant under a lease for years as compared with that of a tenant under a lease from year to year. In the former case the non-payment of rent does not render the possession of the tenant adverse unless he pays rent to some person other than the lessor. But in the latter case the Legislature has treated the mere non-payment of rent by a tenant from year to year as a payment to some person other than the landlord. On these grounds I think the son must be regarded as having been in possession during the twelve years, not as tenant to the testatrix, but in a right in respect of which he was under no obligation to pay rent. Therefore the decision of North J. must be reversed, and the appeal allowed with costs.

Solicitors: *Morris & Bristow, for Jackaman, Sons & Miller, Ipswich; Field, Roscoe & Co., for Birkett & Ridley, Ipswich.*

G. I. F. C.

C. A.
1900
July 25, 26.

In re CHEADLE.
BISHOP *v.* HOLT.

[1899 C. 2749.]

Will—Construction—Ambiguity—Equivocation—Legatee's right of Selection—Evidence—Admissibility—Direct Evidence of Intention.

A testatrix by her will gave "my 140 shares in the Crown Brewery Company" to trustees, upon trust to pay the income thereof to the plaintiff for her life, with remainder in trust for her children, and, if she should die without leaving issue, in trust to divide the same equally between the six defendants, as tenants in common. Two of the defendants were residuary legatees under the will. At the date of the will and at the date of the death of the testatrix she had 280 5*l.* shares in the company, of which forty were paid up in full, and the other 240 were paid up to the extent of 2*l.* 10*s.* per share. An affidavit by the solicitor who had prepared the will was tendered, to shew that the testatrix intended to bequeath 140 of her partly paid-up shares on the above trusts:—

Held, by Kekewich J. and by the Court of Appeal, that this evidence was not admissible:

Held, by the Court of Appeal, reversing the decision of Kekewich J., that the tenant for life was not entitled to select which of the 280 shares she would take:

But *held*, on the construction of the will, and having regard to the circumstances, that the bequest must be satisfied out of the 240 partly paid shares.

Tapley v. *Eagleton*, (1879) 12 Ch. D. 683, and *Asten* v. *Asten*, [1894] 3 Ch. 260, considered.

APPEAL against a decision of Kekewich J.

Ann Cheadle, spinster, by her will dated October 30, 1897, gave "my 140 shares in the Crown Brewery Company, or any stock or shares into which the same shall have been converted at the time of my death, unto my trustees," in trust to pay the income thereof to Edith Mary Holt during her life, for her separate use without power of anticipation, and after her decease in trust for all her children who being sons should attain twenty-one, or being daughters should attain that age or marry under that age, in equal shares, and if only one child in trust for that one child. And in case Edith Mary Holt should die without leaving issue, in trust to divide the same equally

between Ada Letitia Holt, Charlotte Margaret Rebecca Holt, William Holt, Albert Edward Holt, Frederick Holt, and Alfred Holt, as tenants in common.

Ada Letitia Holt and Charlotte Margaret Rebecca Holt were the executors and trustees of the will, and were also the residuary legatees.

The testatrix died on November 15, 1898.

At the date of the will and at the date of her death the testatrix had 280 shares in the Crown Brewery Company, of which forty were fully paid up, and the other 240 were paid up to the extent of 2*l.* 10*s.* per share. All the shares were of the nominal amount of 5*l.*

During the period from 1878 to 1890 the testatrix had acquired forty fully paid shares in the company and 100 shares paid up to the extent of 2*l.* 10*s.* per share.

In 1895, 140 new shares were allotted to her, and before the date of her will she had paid up these shares to the extent of 2*l.* 10*s.* per share.

Edith Mary Holt had married G. H. Bishop, but there was no issue of the marriage.

Upon an originating summons issued by Mrs. Bishop, to which the trustees and William Holt, Albert Edward Holt, Frederick Holt, and Alfred Holt were defendants, Kekewich J. held that the plaintiff was entitled to select which of the 280 shares she would take, and she by her counsel selecting accordingly, the Court ordered that the forty fully paid shares and 100 of the partly paid shares should be held by the trustees upon the trusts contained in the will concerning the 140 shares.

An affidavit by the solicitor who had prepared the will was tendered to shew that the testatrix intended to give 140 partly paid shares, and that his instructions were to that effect, but he did not know that she had any fully paid shares.

Kekewich J. refused to admit this evidence.

The residuary legatees appealed.

St. John Clerke, for the appellants. The will contains an equivocal expression which fits either class of shares, and, that being so, direct evidence of the intention of the testatrix is

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admissible, and the affidavit of the solicitor should have been admitted: *Doe* v. *Hiscocks* (1); *Charter* v. *Charter* (2); Taylor on Evidence, 9th ed. vol. ii. p. 792. If that evidence is admitted, it is clear that the testatrix intended to give 140 partly paid shares. But, if that evidence is not admitted, still there is no right of selection. *Asten* v. *Asten* (3) has not much bearing on the present case. *Jacques* v. *Chambers* (4), which was relied upon in the Court below, does not apply, nor does *Millard* v. *Bailey*. (5) Here the gift is of "my 140 shares," not "140 of my shares." The testatrix evidently had in her mind some particular shares which she intended to give. The forty fully paid shares were not sufficient in number to satisfy the gift, while the 240 partly paid shares were sufficient, and the testatrix must have intended that her bequest should be satisfied out of those shares.

Eustace Smith, for Frederick Holt, who desired to support the appeal. If there be a right of selection it is the right of the legatee, i.e., not the tenant for life alone, but the whole body of those who are beneficially interested in the subject-matter of the gift, and if they cannot agree the executors will have the right to select. At any rate, the tenant for life cannot select alone in opposition to the wishes of another beneficiary.

Ingpen, Q.C., for the plaintiff. Evidence of the instructions which the testatrix gave to her solicitor is not admissible. There is a presumption that when she spoke of "my 140 shares" she was referring to the shares which she originally held, and not to the new shares which were allotted to her by way of bonus.

In *Tapley* v. *Eagleton* (6), a legatee to whom two leasehold houses were bequeathed for life was allowed to select the houses out of three which the testator had. The principle was clearly explained in that case by Jessel M.R.

[LORD ALVERSTONE M.R. In *Asten* v. *Asten* (3) Romer J. commented on *Tapley* v. *Eagleton*. (6)]

In *Asten* v. *Asten* (3) the testator had intended to make the

(1) (1839) 5 M. & W. 363.
(2) (1874) L. R. 7 H. L. 364.
(3) [1894] 3 Ch. 260.
(4) (1846) 2 Coll. C. C. 435.
(5) (1866) L. R. 1 Eq. 378.
(6) 12 Ch. D. 683.

selection himself, but had omitted to do so, and it was held that the legatee could not select, and that the bequests were void for uncertainty.

St. John Clerke, in reply.

Cur. adv. vult.

July 26. LORD ALVERSTONE M.R., after reading the bequest and stating the facts, continued :—In my opinion this is not a case in which the right of selection arises. It is said that the case is governed by the decision of Jessel M.R. in *Tapley* v. *Eagleton*. (1) In that case a testator bequeathed to trustees "all those my leasehold houses situate in" various streets, including "two houses in King Street" upon trust for P. for life, and after his death to form part of the testator's residuary estate. The testator had three houses in King Street, and Jessel M.R. held that two of the houses passed under the gift, and that P. was entitled to elect which two he would take. The learned judge said (2): "If the testator had said 'two of my houses in King Street' the result would have been the same." But I think the distinction which was pointed out by Romer J. in *Asten* v. *Asten* (3) is correct, namely, that "in all these cases it is, of course, essential that the will should not shew that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shews that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the Court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties." And the learned judge added that "*Tapley* v. *Eagleton* (1) does not throw any doubt on this

(1) 12 Ch. D. 683. (2) 12 Ch. D. 684.

(3) [1894] 3 Ch. 263.

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principle, for there Sir George Jessel construed the gift by the testator of 'two houses' as being equivalent to a gift of 'two of my houses.'" So far as I may properly express an opinion, I agree in the view of Romer J. In that case there was no means of solving the doubt to which of the properties the testator was referring. In the present case we have been pressed to admit direct evidence of the intention of the testatrix from an affidavit made by the solicitor who prepared her will. In my opinion that affidavit is not admissible. As a general rule evidence of intention outside the will cannot be received, and I think this is not one of the exceptional cases in which it may be admitted. But I think that, having regard to the surrounding circumstances, the intention of the testatrix, as manifested by her will, was to give 140 of the shares upon which only 2*l.* 10*s.* per share had been paid. The only subject-matter out of which 140 shares could be given was the 240 partly paid shares, and it would not in my opinion be right to fulfil the bequest partly out of one class of shares and partly out of the other. Therefore, in my opinion, the trustees take 140 of the 240 shares on which only 2*l.* 10*s.* per share has been paid.

RIGBY L.J. I agree. I am clear that this is not a case in which extrinsic evidence of intention is admissible. It is not a case of mere equivocation—a case in which the words used by a testator turn out to be equally descriptive of two distinct subject-matters. I agree with the Master of the Rolls that the 140 shares must be taken out of the 240 partly paid shares.

COLLINS L.J. I am of the same opinion.

Solicitors: *Rowcliffes, Rawle & Co., for H. S. Threlfall, Southport; Thomsons, Brooks & Danby, for W. & J. Cooper, Preston; Whitfield & Harrison.*

W. L. C.

In re LEYLAND AND TAYLOR'S CONTRACT.

C.A. 1900 July 5, 6; Aug. 9.

[1900 L. 11.]

Vendor and Purchaser—Town Property—Local Authority—Notices to Pave, &c.—Service of Notices on Vendor before Sale—Non-disclosure to Purchaser—Fraudulent Intent, Absence of—Execution of Works by Local Authority—Expenses—Charge on Premises—Outgoings—Particulars of Sale—Conditions of Sale—"Omission in Particulars"—Compensation—Misleading Condition—Caveat Emptor—Specific Performance—Rescission—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The omission by a vendor, without fraudulent intent, to disclose, before sale, to the purchaser of town leasehold property the fact that he, the vendor, had been served by the local authority with the usual notices under the Public Health Act, 1875, to pave, &c., the street fronting the premises, is not such an "omission in the particulars" tending to depreciate the value of the property as to entitle the purchaser, if he completes his purchase, to compensation under the usual general condition, where the works are not executed by the local authority, and the expenses thereof do not therefore become a charge on the premises, until after the completion of the purchase.

But whether such an omission on the part of the vendor, even though without fraudulent intent, would have afforded the purchaser sufficient ground for resisting specific performance of his contract or for an action for rescission, *quære*.

A condition of sale indemnifying the vendor against expenses "in complying with any requirement enforceable against him and made after the sale by the local authority in respect of paving, &c., the streets" is not such an implied statement that no requirement has been made by the local authority before the sale as to entitle the purchaser to relief on the ground of deception on discovering that notices under the Public Health Act, 1875, had been served on the vendor before the sale.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The facts, as appeared by the statement agreed on by the parties, were as follows:—

On May 8, 1899, a leasehold plot of land in the town of Radcliffe, with some cottages upon it, the whole being held by Henry Leyland upon a ninety-nine years' lease, of which twenty-one years remained unexpired, were put up for sale by auction by Leyland under special conditions of sale and also general conditions adopted by the Manchester Corporation. General

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condition 3 provided that the purchaser should, as from the day fixed for completion, pay all "outgoings" affecting the property. General condition 4 was as follows: "If before the completion of the purchase the vendor shall have expended any money in complying with any requirement enforceable against him and made after the sale by the municipal corporation, local board of health, or other local authority of the city, borough, or district within which such property is situated, in respect of the paving, flagging, or sewering of, or other work in, the roads, streets, or passages on or adjoining the same, the purchaser shall, on the completion of the purchase, repay to the vendor the amount so expended by him, and in case any such requirement shall not have been complied with before the completion of the purchase, the purchaser shall indemnify the vendor in respect thereof." General condition 13 provided that, "if any error, misstatement, or omission in the particulars shall be discovered, the same shall not annul the sale, but, if the same shall be pointed out either by the vendor or purchaser before the completion of the purchase (and not otherwise), compensation shall be allowed or given by the vendor or purchaser, as the case may require," the amount of such compensation to be settled by two referees as therein mentioned. At the sale James Taylor became the purchaser of the property in question for the sum of 300*l.*, and by a memorandum of agreement indorsed upon the particulars and conditions of sale the date for completion was to be June 8, 1899. On the investigation of the title and in answer to a requisition it came to the knowledge of the purchaser for the first time that on April 13, 1899, that is, prior to the sale, the local authority had served notices on the vendor to pave, flag, and sewer the street opposite the cottages, and that the work was to be done in accordance with plans and sections then lying for inspection by the vendor at the offices of the local authority, and that these plans and sections shewed that the level of the street opposite the said cottages would be several inches above the ground floors. The purchaser objected that the particulars and conditions of sale contained no mention of these notices; and it was admitted that if he had been aware

of the notices having been given he would not have bid for the property, or at any rate would not have bid so much as he did in fact bid. He accordingly made a claim for compensation under the 13th condition, on the ground that the non-disclosure of the fact that the notices had been served on the vendor was an "omission in the particulars." On the other hand, the vendor contended that there was no obligation on his part to disclose the fact that the notices had been served, and that the non-disclosure was not an "omission in the particulars" entitling the purchaser to any compensation. Ultimately, on June 19, 1899, the purchase was completed and the purchase-money was paid, but without prejudice to the question whether the purchaser was entitled to compensation in respect of the notices. It was conceded that the omission to disclose the fact that the notices had been served was not due to any fraud on the part of the vendor, and that his solicitors had no knowledge of their having been served upon the vendor until after the sale. When the fact was discovered by the purchaser no steps had been taken either by the vendor or by the local authority to execute the works mentioned in the notices, but subsequently, in January, 1900, the works were completed by the local authority. By agreement between the parties a summons was taken out by the vendor under the Vendor and Purchaser Act, 1874, for a declaration that the purchaser was not entitled to compensation under condition 13. The Vice-Chancellor was of opinion, first, that the particulars of sale were not full and fair as between vendor and purchaser, inasmuch as they omitted to state a fact of great importance in determining the value of the property; and, secondly, that condition 4 was so framed as to lead to the inference that no notices had been given to the vendor prior to the date of the contract, and that consequently it was calculated to mislead. In these circumstances the Vice-Chancellor thought that the purchaser was clearly entitled to compensation under condition 13. The vendor appealed.

The appeal was heard on July 5 and 6, 1900.

Daniel Jones, and *W. Ambrose Jones*, for the vendor. It was not the duty of the vendor to mention the notices. To a

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prudent purchaser of such property as this the fact of the notices having been served would not make any difference in the value of the property: the purchaser knows the liability to be an impending liability, and that the notices will come sooner or later, and, therefore, in fixing on his purchase-money, he makes a deduction for the possible outlay. Even if it were material that the purchaser should have been informed of the notices, he himself had the means of information at hand, for he might have inquired at the offices of the local authority. If he failed to do so, he alone was to blame. It is not the duty of a vendor to call the purchaser's attention to a fact he can find out for himself. We submit, as a matter of law, that the purchaser must be taken to have known of the impending liability, since he could have ascertained it by availing himself of s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which provides that the plans of the proposed works, of which notice is given to the frontagers, are to be deposited at the offices of the local authority and to be open at all reasonable hours for inspection by "all persons interested therein"; and an intending purchaser is a "person interested." Under s. 257 the expenses of carrying out the works by the local authority are, no doubt, a charge upon the premises, but not until the actual completion of the works: *Hornsey Local Board* v. *Monarch Investment Building Society.* (1)

[*Upjohn Q.C.* I admit there is no effective charge until completion.]

The critical period is the date of completion: till then, no one is under any liability in respect of the expenses. The local authority is under no obligation even to proceed with the works. The Vice-Chancellor was wrong in holding that the conditions were misleading. Condition 4 is expressly intended to protect the vendor against any possible "requirement" (as to paving, &c.) made after the sale. Here there was no "requirement enforceable" made before the sale: had there been such—that is, an enforceable liability—then the vendor might have been under an obligation to inform the purchaser, though he could have protected himself by a special condition.

(1) (1889) 24 Q. B. D. 1.

Upjohn, Q.C., and *Tweedale*, for the purchaser. The question is, What is the duty of the vendor? It is to disclose all material circumstances. For instance, where the vendor, a lessee, did not inform the purchaser of the receipt of the landlord's notice to repair, and the purchaser was evicted, the purchaser was held entitled to have his deposit returned, although he knew, at the time of the sale, that the premises were dilapidated: *Stevens* v. *Adamson* (1), cited as a good authority in Sugden's Vendors and Purchasers, 14th ed. p. 331. Therefore the vendor in this case ought to have informed the purchaser of the notices. But, further, he sold under a condition (condition 4) creating an impression on the mind of the purchaser that no notice had been given. It was a suggestio falsi, misleading the purchaser. Then condition 3 stipulated that the purchaser should only pay "outgoings" after the day fixed for completion. These expenses were "outgoings" before completion, for they were accruing when the notice was served, and were therefore payable by the vendor.

[LORD ALVERSTONE M.R. It was not certain that the notice would result in a debt until the local authority had decided to go on with the work, and the work had been executed.]

Expenses of this kind are an "outgoing": *Tubbs* v. *Wynne*. (2) It is essential that on a sale the particulars should fairly and accurately describe the property sold. It is not sufficient merely just to tell what is not actually untrue: they should state everything that is material for the purchaser to know in order to judge of the nature or value of the property: Dart's Vendors and Purchasers, 6th ed. p. 127. A "person interested," in s. 150 of the Public Health Act, 1875, means "a person having a legal interest," not a person going to see the plans out of mere curiosity, for he has no right to see them.

Daniel Jones, in reply. The observations cited from Dart relate to title only: that is to say, the vendor is bound to disclose facts which materially affect the title to the property and which the purchaser cannot otherwise know; they do not apply to a case of caveat emptor, which is this case.

(1) (1818) 2 Stark. 422; 20 R. R. 707. (2) [1897] 1 Q. B. 74, 77.

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In *Tubbs* v. *Wynne* (1) the judgment went entirely on there having been a magistrate's order, and distinguishes that case on that ground from *In re Boor* (2), a case that is much nearer the present, for there the works were actually completed, and yet Kay J. held that the expenses were not "outgoings." As to condition 4 it means what it says, and nothing more should be read into it than what the words imply. It should not be construed as stating by implication that no requirements had been made before the sale. In conclusion, I submit that a vendor is under no obligation to disclose that which the purchaser can ascertain for himself.

Cur. adv. vult.

Aug. 9. LORD ALVERSTONE M.R. I have had very considerable difficulty in arriving at a conclusion in this case. [After stating the facts and the decision of the Vice-Chancellor, his Lordship continued:—] In the face of the agreed statement of facts I do not think it is possible to hold that the non-disclosure of the notice was immaterial. The purchaser, however, elected to complete the contract, and to rely upon his rights under the 13th condition. I have felt very considerable difficulty in coming to the conclusion that the neglect of the vendor to disclose the notice was "an error, misstatement, or omission in the particulars" within the meaning of that condition; but, upon the whole, I am not prepared to say that, if the omission to disclose the notice could affect the value of the property, no claim for compensation could have been made. The ground upon which I come to the conclusion that the judgment of the Vice-Chancellor cannot be supported is that I do not see how the mere omission to disclose such a notice can possibly have affected the value of the property sold. The time when and the circumstances under which such a notice may be served, and the character of the works to be executed, rest with the local authority; and, buying such property, the purchaser must be taken to have known that such a notice might be served at any time, and to have bought subject to such a contingency. And, in my opinion, the fact that the notice was served at one

(1) [1897] 1 Q. B. 74. (2) (1889) 40 Ch. D. 572.

time or the other could not possibly have affected the value of the property sold for the purpose of the contract. For these reasons, I think, the appeal must be allowed. The vendor must have the costs of the summons and of the appeal.

RIGBY L.J. stated the facts, and observed that it was not questioned that the notices had been properly served by the local authority and were within their jurisdiction under the Public Health Act, 1875, or that the effect of them was to entitle the authority, in default of performance of the works required to be done, themselves to do the works, and after completion to charge the expenses on the owners in manner provided by the Act. They might charge the expenses as a lump sum or by instalments extending over not more than thirty years. His Lordship then proceeded:—

The purchaser must be taken to have known the state of the property, and the fact that the local authority might serve such notices as were served at any time before or after the sale.

It is plain that the purchaser can have no greater or other right than that, if any, which he has under the 13th general condition. Completing the purchase without prejudice to any claim under that condition for compensation cannot alter or extend the claim. The purchaser in fact elected to go on with and complete the purchase, taking his chance of compensation under the 13th condition. The owner of so partial an interest as is dealt with in this case could not reasonably be expected himself to incur on behalf of all parties the expense of doing the work; and it was assumed, and rightly, on both sides throughout the case, that the works if done at all would be done by the local authority.

Now the only matter upon which the purchaser bases his case is the omission without fraudulent intent to disclose the service of the notices. It is necessary, therefore, to ascertain correctly the consequences of that non-disclosure. The non-disclosure could not affect, to the smallest extent, the works to be done by the local authority, or the sums to be charged to the owners in respect thereof, or the time or manner at or in which those sums would turn out to be payable. Different

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considerations might arise if the vendor were claiming specific performance or the purchaser rescission. The purchaser says in substance, "If I had known of the notices I would not have entered into the contract." Whether, if specific performance were being claimed against him or he were bringing an action for rescission, an omission without fraudulent intent to disclose the notices would have been sufficient ground to entitle him to judgment, it is not necessary, and therefore not proper, to determine. Any such point has nothing to do with that really before us. All that need be said is that, if the omission be, for any reason, not within the 13th general condition, it does not seem that that condition could in any way interfere with a right to rescind otherwise existing.

To return to the consequences of non-disclosure of the notices. Whether the execution of the works would be an advantage or a disadvantage to the purchased property is not for us to say, nor have we the means of judging. It suffices that the local authority is acting within its jurisdiction as to levels (see s. 157 of the Public Health Act, 1875), as well as in other respects, though there is not the slightest evidence that the level of the road has been or is to be altered. The vendor's omission to disclose in no way tends to burden the purchased property. The local authority are alone liable; and if it were assumed that their action in any way injures the purchased property, they alone are responsible and would justify under the Act, and the vendor cannot be treated as having caused or contributed to the injury. Condition 13 is only meant to apply when there is an omission which tends in some way to render the property less valuable, and the Court can see its way to the principle on which the amount of compensation is to be estimated. The material words are: "If any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but, if the same shall be pointed out either by the vendor or purchaser before the completion of the purchase (and not otherwise), compensation shall be allowed or given by the vendor or purchaser, as the case may require," and the amount of such compensation is to be settled, &c. No case was cited to shew that the vendor was bound to insert in

the particulars the fact of the service of the notices except *Stevens* v. *Adamson* (1); but there, as the consequence of the omission, the purchaser had been ejected. If it clearly appears that the omission of the vendor in itself causes no damage, the 13th general condition is inapplicable, even if the non-disclosure of the notices were an omission in the particulars.

The 4th condition has been referred to as deceptive. It refers to a possible state of circumstances which has not arisen, and provides for the case of a requirement made after the sale by a local authority and for the vendor's indemnity in respect thereof. No such requirement has been made in the present case, and therefore the 4th condition in no way applies. Further, it contains no statement of fact whatsoever; and I am at a loss to understand how a condition in favour of a vendor in a particular case which does not happen can involve a holding-out that another case not within the scope of the condition has not arisen, especially where the condition is in general language and would cover cases not even presumably excluded from possibility or even probability by the notices actually served.

I cannot see how the 4th condition can be deceptive, though, even if it were, I do not understand how that could be important on the question now to be decided. It is not the course of the Court to punish arbitrarily mistakes which cannot be shewn to have themselves caused damage and have not been fraudulent; and it would be a mere arbitrary punishment if the vendor were charged with the consequences of works done by the local authority within their statutory powers. The purchaser has been wrong in this litigation throughout, and there should be a declaration that he is not entitled to compensation under the 13th general condition. The vendor will have his costs both here and below.

COLLINS L.J. I think the failure to state the fact that notices had been served by the local authority was such an error or omission on the part of the vendor as to entitle the purchaser to compensation if he could have shewn that it

(1) 2 Stark. 422; 20 R. R. 707.

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affected the value of the property purchased. Though I have had some doubt whether we can say that, as a matter of law, such compensation could not be more than nominal, I am not prepared to differ from my brethren who think it could not; and if so, the case ought not to be sent to referees to determine the amount.

Solicitors: *Nicol, Son & Jones, for Pickstone & Jones, Radcliffe; Alfred Grundy, Son & Co., Manchester.*

G. I. F. C.

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STIRLING J.

[1899 T. 865.]

1900

May 29, 30; *June* 23.

Merger—Legal Estate—Equitable Interest—Intention—Vendor and Purchaser—Estate of Vendor—Expressed Grant of Fee—Leasehold Title in Equity—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 63.

H. was entitled to certain houses for a term of ninety-nine years (less one day) by way of mortgage from W. W. was entitled to the property for the original term subject to the mortgage, and H. was entitled to the reversion in fee expectant on the determination of the original term. Under these circumstances W. conveyed the property to H. for the unexpired residue of the original term, and H. covenanted to indemnify W. against the rents and covenants in the lease and the principal and interest secured by the mortgage. H. afterwards conveyed by way of sale to W. in fee, the conveyance being expressly "subject to and with benefit of the lease," and W. then conveyed to the plaintiffs in fee "subject to and with benefit of the lease." H. subsequently purported to convey by way of mortgage in fee to the defendant, who had no notice of the plaintiffs' title:—

Held, that whether the original term had merged in the reversion or not, yet, inasmuch as H. and W. had dealt with one another on the footing that the term was to be deemed in existence, it would be inequitable to allow it to be treated as at an end. H. had therefore, when he purported to convey the fee to the defendant, an equitable estate to the extent of the leasehold interest, which, under s. 63 of the Conveyancing Act, 1881, passed to the defendant, and the plaintiffs were bound to give effect to it.

The question whether two equitable estates are merged or not is one of intention. Whether this rule applies where a merger of legal estate has actually taken place, *quære*.

THE question in this action was as to the respective rights and interests of the plaintiffs and defendant in and to six houses, Nos. 1 to 6, Pepys Road, Raynes Park, and three houses, Nos. 1 to 3, Worple Road, Raynes Park.

The plaintiffs' title to the property was derived in the following manner. By an indenture dated November 12, 1891, the sites of all the houses in question were conveyed to Henry George Heather, a solicitor, in fee. By six leases, two dated February 6, two February 21, and two March 14, all in the year 1893, Heather demised the six houses in

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Pepys Road to William Went, a builder, each for a term of ninety-nine years from March 25, 1892, at the respective rents and subject to the conditions and covenants thereby reserved and therein contained. By six several indentures of mortgage, two bearing date February 6, two February 21, and two March 14, all in 1893, Went sub-demised each of the houses in Pepys Road to Heather for a term of ninety-nine years (less the last day thereof) by way of mortgage to secure the sum of 575*l.* By deed dated April 4, 1893, after a recital to the effect that Heather was seised in fee simple of all the houses in Pepys Road, subject to the indentures of lease in favour of Went, and that Heather had agreed to sell to Went the hereditaments subject to the leases at the price of 1482*l.* 1*s.* 3*d.*, it was witnessed that Heather in consideration of that sum (of which the receipt was acknowledged) conveyed the houses together with the rents reserved by the leases and the benefit of the covenants and conditions therein respectively contained to Went in fee subject to the respective leases and the terms of years thereby respectively created. By an indenture dated April 6, 1893, after recitals to the effect that Went was seised in fee of the six houses in Pepys Road subject to the several indentures of lease whereby the same were respectively demised to Went for the terms of years therein specified, and that Went had agreed to sell to the plaintiffs the houses, subject to the leases, at the price of 1675*l.* 7*s.* 6*d.*, it was witnessed that in consideration of that sum (of which the receipt by Went was acknowledged) Went conveyed the six houses, together with the rents reserved by the leases and the benefit of the covenants and conditions therein contained, to the plaintiffs in fee subject to the leases and terms of years thereby respectively created.

By three several indentures dated July 4, 1893, Heather demised the three houses in Worple Road to Went for a term of ninety-nine years from March 25, 1892, at a rent and subject to the covenants and conditions thereby reserved and therein contained. By three several indentures bearing the same date, Went sub-demised each of these houses to Heather for the term of ninety-nine years (less the last day) by way of mortgage to

secure the sum of 575*l*. By two several indentures dated July 12, 1893, Went assigned to Heather the equity of redemption in all these houses. Both deeds were in the same form. They contained recitals of the leases and the indentures of mortgage; that the several respective sums mentioned in the second column of the said 2nd schedule still remained due and owing on the security of the mortgages; and that Went had agreed to sell to Heather the premises comprised in the indentures of lease for the then unexpired residue of the term of ninety-nine years subject to the rents and covenants and conditions therein reserved and contained, and subject also to the indentures of mortgage and to the principal sums secured thereunder, at the price of 300*l*. Then it was witnessed that in consideration of the sum of 300*l*. Went, as beneficial owner, assigned to Heather the messuages and hereditaments described in the first column of the schedule thereto and all other, if any, hereditaments comprised in the several indentures of lease, "to hold the same unto the said Henry George Heather for all the residue now unexpired of the said terms of ninety-nine years subject to the rent reserved by the said several indentures of lease and the covenants and conditions in the same indentures contained thenceforth on the part of the lessee to be observed and performed, and subject also to the several indentures of mortgage and the six several principal sums of 575*l*. secured thereunder and all interest henceforth to become due in respect of the same." Then Heather covenanted with Went that he, Heather, would "during the residue of the said term pay the rents respectively reserved by the said indenture of lease and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be observed and performed, and will keep indemnified the said William Went and his estate and effects from and against all claims and demands on account of the same, and also in respect of the said six several indentures of mortgage and the several principal sums due thereunder, and all interest henceforth to become due in respect of the same." By an indenture dated July 20, 1893, in the same form as that of April 4, 1893, Heather, in consideration of the sum of 669*l*. 11*s*. 9*d*. (of which receipt was

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acknowledged), conveyed to Went in fee the three houses in Worple Road, subject to and with the benefit of the three leases thereof in a similar way to which the conveyance of April 4, 1893, was expressed. By an indenture dated July 29, 1893, in the same form as that of April 6, 1893, Went, in consideration of 756*l.* 18*s.* 6*d.*, conveyed to the plaintiffs in fee the three houses in Worple Road subject to and with the benefit of the three leases thereof. The plaintiffs thus acquired a title to all the nine houses subject to and with the benefit of all the several leases which had been granted to Went.

By an indenture dated December 20, 1894, Heather purported to convey all the nine houses to the defendant in fee by way of mortgage to secure 2600*l.* and interest. The defendant when she acquired her title had no notice of that of the plaintiffs. By the pleadings the defendant asserted that she was entitled to the property as mortgagee in fee, or, alternatively, to the benefit of the leasehold interest. At the bar, however, the latter contention only was relied upon, and the case was argued on that footing.

Butcher, *Q.C.*, and *Waggett*, for the plaintiffs. The plaintiffs are entitled to a declaration that they are owners of the property in fee. When the mortgages were disposed of, nothing remained but the leasehold interests, and they became merged in the fee. Whatever may have been the case in equity, there was a merger at law. Since the Judicature Act, 1873, s. 25, sub-s. 4, no doubt the question has become one of intention, and equity will prevent a merger if injustice would follow from it: *Snow* v. *Boycott* (1); but Lindley L.J. said in *In re Radcliffe* (2) that "mergers are odious if misapplied so as to do injustice." In the present case a merger would not do so.

Heather was owner of the reversion in fee and entitled to a mortgage of the leasehold interest. When he obtained the equity of redemption there could be no object in preserving separate estates in the land, and therefore merger followed as a matter of course. Where the first of two mortgagees acquires the equity of redemption, and does not have the first mortgage

(1) [1892] 3 Ch. 110. (2) [1892] 1 Ch. 227, 232.

kept alive by having it assigned to a trustee, then although there may be a merger at law there will be none in equity, because the position of the first mortgagee would be unjustly prejudiced: *Adams* v. *Angell.* (1) In such a case it is pointed out by Jessel M.R. that there would be a merger if there were no reason for keeping the charge alive: *Thorne* v. *Cann* (2); *Liquidation Estates Purchase Co.* v. *Willoughby.* (3) Here there is no reason for invoking the equitable doctrine to prevent the merger which has taken place by operation of law.

Upjohn, Q.C., and *Carson*, for the defendant. Whatever interest remained in Heather at the date of the mortgage to the defendant passed to her under s. 63 of the Conveyancing Act, 1881, so that at any rate she is entitled to the leasehold interest. As to the Pepys Road property, there was no merger of Heather's sub-terms. The last days of those terms were held by Went as trustee for Heather, and the conveyance of the reversion did not effect a merger: *Chambers* v. *Kingham.* (4) In any case the sub-terms did not pass to Went, but remained outstanding after the conveyance by Heather to Went. Went only passed to Thellusson what he got from Heather; and if Went never acquired the sub-terms neither did Thellusson: *Brandon* v. *Brandon.* (5) The plaintiffs claiming through Went cannot be heard to say that the leases are not subsisting. The terms were in Went and remained in him. The conveyance by Went may be construed as a reservation in his own favour: *Cottee* v. *Richardson.* (6) Where the intention of the parties is clear the Court will give effect to it. The sub-terms remained in Heather, and under the defendant's mortgage passed to her.

As to the Worple Road property, it is said that the deed of July 12, 1893, consolidated in Heather every existing interest. He had the fee and the sub-terms, and it is said that the deed gave him the one day which separated the fee from the term; so that the fee simple, the head terms, and the

(1) (1877) 5 Ch. D. 634.
(2) [1895] A. C. 11.
(3) [1898] A. C. 321.
(4) (1878) 10 Ch. D. 743.
(5) (1861) 31 L. J. (Ch.) 47.
(6) (1851) 7 Ex. 143.

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sub-terms became vested in him. The question is, what was the intention? If merger had been intended it might have been effected by another form of deed, namely, by a release of Went's interest. The parties, however, were careful to keep all the interests distinct, and to prevent the head terms from merging. If merger was intended it is inconceivable that the deed should have been drawn in the form in which it was. It is in form a conveyance subject to the head terms and the rents thereby reserved and to the mortgages, and it contains a covenant by Heather to indemnify Went against the covenants in the head leases, and against liability in respect of the mortgages. The obvious reason for that was that Went might have created subsequent incumbrances. The defendant claims under Heather, and is prior in date.

The Court will give effect to the intention of the parties. It is a simple question of intention: *Thorne* v. *Cann.* (1)

The plaintiffs bought ground-rents, and nothing more; they are trying to get what they never bargained for, at the expense of the defendant.

In order to produce a merger the concurrent intention of both parties is necessary. The form of the deed shews that that never could have existed here. Prior to the Judicature Act, the Courts of Equity would not give effect to a legal merger where it was manifestly contrary to the intention of the parties, and if a technical merger took place at law no effect would have been given to it. Since the passing of the Judicature Act there is no merger at law where there would be none in equity.

[They also referred to Tudor's Leading Cases on Real Property, 4th ed. pp. 250, 251.]

Butcher, Q.C., in reply.

P. S. Stokes held a watching brief for the executors of Heather.

Cur. adv. vult.

June 23. STIRLING J. (after stating the facts). It was admitted at the trial on behalf of the plaintiffs that the

(1) [1895] A. C. 11.

defendant acquired her title without notice of theirs. It was also admitted on behalf of the defendant that she could not under the deed of December 20, 1894, claim a title to the fee simple of the property; but she insisted that under s. 63 of the Conveyancing Act of 1881 there passed to her whatever estate, right, or interest Heather had in the property at the date of the deed. I think this contention is well founded, and the question is whether he had any estate, right, or interest in the property at that time.

The case is somewhat simpler as regards the Pepys Road property than as regards Worple Road, and I begin with the former. On April 4, 1893, Heather was entitled to the Pepys Road houses for terms of ninety-nine years (less one day) by way of mortgage. Went was entitled to the same houses for the terms of ninety-nine years subject to Heather's mortgage and the sub-demise contained therein; and Heather was entitled to the reversion in fee expectant on the determination of the terms of ninety-nine years. On that day he conveyed his reversion to Went, and I assume (without deciding) that the terms of ninety-nine years vested in Went became merged in the reversion, but Heather's sub-terms of ninety-nine years (less one day) and his rights as mortgagee remained unaffected. On April 6, 1893, Went conveyed the six houses, subject to and with the benefit of the terms which had been granted, to the plaintiffs. That conveyance did not and could not affect the position of Heather. On July 12, 1893, Went assigned the equity of redemption in the terms of ninety-nine years to Heather. At that time Heather had parted with his reversion in fee, and had only a limited interest in the property. According to the ordinary presumption in equity as regards his mortgage on the property, that mortgage would be kept on foot for his benefit. As regards his position at law, he still held the terms of ninety-nine years (less one day). Those interests were unaffected by anything which happened subsequently, and, as it appears to me, passed to the defendant by the conveyance of December 20, 1894.

As regards the Worple Road property the case stands somewhat differently. On July 12, 1893, Heather was entitled

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to these houses for terms of ninety-nine years (less one day) by way of mortgage. Went was entitled for terms of ninety-nine years subject to the mortgage in favour of Heather, and Heather was entitled to the reversion in fee expectant on the determination of the terms of ninety-nine years. On that day Went conveyed the houses to Heather for all the residue unexpired of the terms of ninety-nine years. It is said that Heather's sub-terms of ninety-nine years (less one day) merged in these terms of ninety-nine years, and that the latter merged in the fee of which Heather thus became owner, and that, this being so, there is no presumption in equity that the mortgage was intended to be kept on foot. He afterwards, on July 20, conveyed to Went in fee subject to and with the benefit of the several indentures of lease; but it is said that the leases were then gone, and that as Went could not get the benefit stipulated for, so he was exempted from the burden of those leases, and simply acquired by his conveyance a fee simple in possession. In like manner, when on July 29 Went conveyed to the plaintiffs in fee subject to and with the benefit of the leases, it is said that the plaintiffs acquired a fee simple in possession and not a reversion.

If this reasoning be sound, it seems to me that the plaintiffs will have acquired a benefit for which they did not bargain. The conveyance to them purports to be a conveyance of a reversion expectant on the determination of certain terms, not of a fee simple in possession. The contract as recited in the conveyance is for the purchase of the hereditaments subject to leases. The entries in Heather's books which have been put in evidence by the plaintiffs themselves shew that the purchase-money was paid, not for land free from leases, but for ground-rents. The sum of 575*l.* was advanced by way of mortgage on the leases of each of the three houses; for the reversion of all the three only 669*l.* 11*s.* 9*d.* was paid. This is an indication that the value of the leases was substantial; and certainly it cannot be assumed that the price paid for the reversion thereon expectant was an adequate price for the fee simple in possession.

Now, the foundation of the argument for the defendant rests

on the deed of July 12, 1893. That deed appears to me to afford strong intrinsic evidence of an intention on the part of both Heather and Went that the terms of ninety-nine years and the mortgages should remain on foot. If that was not the intention, why should Heather covenant to indemnify Went against the rents and covenants in the leases and the principal and interest secured by the mortgages? I shall assume that the existence of such an intention would not be sufficient to prevent a merger according to the rules of common law. The rules, however, of equity are different, and s. 25, sub-s. 4, of the Judicature Act, 1873, provides that "There shall not . . . . be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity." In *Hopkins* v. *Hopkins* (1) the rule as to merger of purely equitable interests is thus laid down: "In the cases of merger there are many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts, where the legal estate continued in the trustees, but have been against the merger if the justice of the case required it." In one long line of cases, recently recognised and followed by the House of Lords in *Thorne* v. *Cann* (2), it has been established that the question whether two equitable interests are merged or not is one of intention. It is contended that the like rule applies where a merger of legal estate has actually taken place. On this point there is great absence of authority. The subject was much considered by Kindersley V.-C. in *Brandon* v. *Brandon*. (3) There the learned judge states the general proposition in this way: "I apprehend that as a general rule where it is a question whether equitable interests merged, primâ facie, the rule which prevails at law will prevail in equity, namely, that if the estates are legal there will be a merger of the legal estate, and primâ facie, where the estates are purely equitable there will be a merger of the equitable estates. But it is clear, that with regard to the question whether there is a merger of equitable interests, a court of equity so regulates the rights of the parties

(1) (1738) 1 Atk. 581, 592. (2) [1895] A. C. 11.
(3) 31 L. J. (Ch.) 47, 49.

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with reference to the doctrine of merger, that it will not allow that merger to take place if it sees equitable reasons for holding that it should not take place, and not only where it is a mere question of a merger of purely equitable interests, but will also deal with it even where there is an actual legal merger, and even then will so regulate the equitable interest that if there is sufficiently equitable ground for so holding, will hold that there is no merger of the equitable interest." The learned judge then went on to consider the circumstances of the particular case, which were very complicated, and he ultimately arrived at the conclusion which is stated on p. 51, that it was not the intention that this merger should be produced, "or rather," he says, "I should put it more strongly than that, and say that it was the intention of Samuel to keep the leasehold interest alive and existing, as independent of, and unmerged in, that freehold interest" to which he was entitled. It is to be observed that he abstains from saying, and he certainly did not decide, that this conclusion on the subject of intention was sufficient for the determination of the case. On the contrary, he proceeds, after remarking that the question arose as early as the institution of the suit in 1819: "We find that from the period of the institution of the suit down to the present time there has been a uniform course of dealing, either by the positive direction of the Court, or, at all events, under the sanction of the Court, which has uniformly and throughout treated the leasehold interests as subsisting interests unmerged in the fee. It is not that I am of opinion that merely by the acquiescence of the parties they have debarred themselves from complaining of what has been done, and endeavouring to set it right; but the effect of that dealing not only prevents them from disturbing what has been done, but would have the effect of debarring them now from saying that all that has been done was not rightly done, and done with a perfect knowledge on the part of those who concurred in what was done. In that view, it would be quite contrary to all principles of equity to say that this Court will determine now that there was, as to a portion of the property at least, a legal merger, that that legal merger ought now to operate, and that this Court ought not to

consider that there were equitable circumstances to induce the Court to have acted as it has acted throughout the whole course of this suit"; and he held that there was no merger. The decision, therefore, appears to me to rest on the ground that there had been a course of dealing which rendered it inequitable that the legal merger should be set up. In a case which has been decided since the Judicature Act came into operation, namely, *Snow* v. *Boycott* (1), a question arose as to the effect of a merger as regards lands which are stated in the report as being subject in part only to legal mortgages in fee, and it was there decided as regards the estates which were purely equitable that the question as to merger was governed by the ordinary rule in equity, namely, that of intention, and no distinction seems to have been drawn with regard to the portion as to which there was a legal merger. That is a conclusion at which in such a case one, no doubt, would desire to arrive; but I do not think it is necessary for me in the present case to decide that the mere expression of intention is sufficient to prevent a merger where legal interests are involved. If it is a question of intention, then it seems to me that the deed of July 12, 1893, alone affords evidence of an intention that the terms of ninety-nine years should remain in existence. But the evidence goes far beyond that. On July 20, 1893, Heather conveyed the property to Went subject to and with the benefit of the leases. That conveyance, if it had been executed by Went, might have operated at law possibly as a fresh demise to Heather on the terms of the old leases in accordance with the principles laid down in *Doe* v. *Lock* (2) and *Wickham* v. *Hawker* (3); and although in the absence of such execution it may not have that effect, still it may be used as evidence of an agreement on the part of Went to make such a re-demise. At all events, this deed of July 20 contains a recital of an agreement by Heather to sell subject to the leases; and, when read in conjunction with the deed of July 12, seems to me to establish that Heather and Went dealt with one another on the footing that the leases were, or were to be

(1) [1892] 3 Ch. 110. (2) (1835) 2 Ad. & E. 705, 743; 41 R. R. 496.
(3) (1840) 7 M. & W. 63.

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deemed to be, in existence. This being so, I think it would be inequitable to allow Went to treat those leases as at an end; and as the plaintiffs purchased from Went expressly subject to the leases, it seems to me that they can be in no better position in equity. But then it is said, and with force, that both Went and the plaintiffs took not merely subject to the leases, but with the benefit of them; and it is further said that, inasmuch as the leases are (as I assume) merged at law, the plaintiffs do not find themselves in the position in which they were entitled to be under the deed.

Prior to the Judicature Act, 1873, Heather could only have established his rights in a court of equity, and, on seeking the aid of such a court with the object of having the leases treated as still subsisting, he must, as the price of obtaining relief, have submitted to such equitable terms as the Court saw fit to impose, and those terms would have included the acceptance by him of legal leases on the same terms as the old. Since the Judicature Act, 1873, every judge of every court is bound to give effect to every equitable estate or right: s. 24, sub-s. 2.

In my judgment, therefore, Heather had, under the law as it stood prior to the Judicature Act, 1873, an equitable interest in the Worple Road property subject to the condition of accepting a proper lease in the way I have stated. That interest appears to me to have passed to the defendant by the mortgage of December 20, 1894.

The same reasoning applies equally to the interest of Heather in the Pepys Road property.

The defendant has at the bar offered to accept from the plaintiffs legal leases of the houses on the same terms as the old; and under those circumstances it becomes unnecessary for me to consider whether under the Judicature Act merger has or has not taken place. I think that for the purposes of the present case a declaration in the following terms will be sufficient for the determination of the question which arises between the plaintiffs and the defendant:—

The defendant by her counsel offering to accept from the plaintiffs leases of the several houses, Nos. 1–6, Pepys Road, and Nos. 1–3, Worple Road, in the statement of claim men-

tioned, for the respective residues of the terms created by the several indentures of lease of such houses respectively in the statement of claim also mentioned at the rents reserved by and subject to the covenants and conditions contained in such indentures respectively: Declare that the defendant as mortgagee under the indenture of December 20, 1894, in the defence mentioned is entitled in equity to the said houses for the respective residues of the said terms, but subject to the payment of the said respective rents and to the observance and performance of the said respective covenants and conditions.

If either party desires any relief on the footing of that declaration, the proper relief will be added. I think that both parties must bear their own costs.

Solicitors: *Golding & Hargrove; Hardisty, Rhodes & Hardisty; W. Sanders Fiske.*

G. A. S.

KEKEWICH J.

1900

July 27, 28; *Aug.* 3.

In re TREASURE. WILD *v.* STANHAM.

[1900 T. 1008.]

Estate Duty — Incidence — Will in exercise of Power of Appointment — Direction to pay Testamentary Expenses—Appointed Fund—Residue— Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor as such; consequently, the estate duty in respect thereof (in the absence of any direction in the will to the contrary) is payable out of the fund; but such estate duty falls within the description of testamentary expenses; consequently, where the will contains a direction to pay testamentary expenses out of the residue, the estate duty in respect of the fund is payable out of the residue.

THIS was an originating summons taken out by the executors of the will of the late Sarah Hatt Treasure, widow, to determine the question whether the estate duty payable on the death of the testatrix in respect of property appointed by her will under the power of appointment vested in her by the will of her father, James Wild, deceased, ought to be borne and paid by and out of the property so appointed, or whether the same ought to be borne and paid by and out of the residuary estate of the testatrix.

Under the will of her father, James Wild, deceased, and in the events which happened, Mrs. Treasure had a general power of appointment by will over one-third of the testator's residuary estate.

By her will dated February 26, 1894, Mrs. Treasure, being then a widow, appointed the plaintiffs and another person (who predeceased her) executors and trustees of her will, and after giving divers specific and pecuniary legacies she appointed, with regard to all the property or share or shares of property to which any power of appointment whether general or special vested in her under the will of her father extended, and by virtue of the same power, that the same property or share or

shares of property should be held upon trust for the plaintiff James Anstey Wild and the defendant Elizabeth Phillips Stanham as tenants in common and equal shares, and the testatrix devised and bequeathed her residuary real and personal estate upon trust for sale and conversion, and to divide the proceeds (after paying her funeral and testamentary expenses and debts and the legacies thereby bequeathed) between the defendants Annie Gordon Stanham and Sarah Anne Wade in equal shares.

John Dixon, for the plaintiffs, the executors and trustees, stated the case.

P. O. Lawrence, Q.C., and *Cann*, for the appointees. The estate duty in respect of the appointed fund is payable out of the residue on two grounds: first by the terms of the will, and secondly by virtue of the Finance Act, 1894.

First, the expression "testamentary expenses" contained in the will of the testatrix includes this estate duty, as being an expense which must necessarily be defrayed by her executors in order that they may obtain an effectual grant of probate extending to the whole property of the testatrix available for the payment of her debts: *In re Clemow*. (1) It is clear law that the appointed property is so available: Williams on Executors, 9th ed. p. 1550; and it follows that the estate duty is thrown by the direction in the will on the residuary estate.

Secondly, assuming that this property is personal estate, it is property which "passes to the executor as such" within the meaning of the Finance Act, 1894, and therefore does not fall within s. 9, sub-s. 1, of the Finance Act: see *In re Culverhouse* (2), where the effect of the sub-section was considered, and it was held that leaseholds specifically bequeathed passed to the executor as such, and that the burden of the estate duty payable in respect of them must, therefore, be borne by the residuary personal estate. *In re Hoskin's Trusts* (3) is an authority to shew that a fund appointed by will, being assets

(1) Ante, p. 182. (2) [1896] 2 Ch. 251.
(3) (1877) 6 Ch. D. 281.

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available for the payment of the testator's debts, passes to the executor in his representative capacity.

[They referred also to *In re Boyd* (1), *In re Palmer* (2), and Austen-Cartmell on Finance Acts, pp. 39, 70, 110.]

Warrington, Q.C., and *W. A. Peck*, for the residuary legatees. The estate duty is payable out of the appointed fund. It was not intended by the framers of the Finance Acts to alter the incidence of the duty, and in such a case as the present the duty, under the pre-existing law, would have been payable out of the appointed fund. The view on which the statute of 23 Vict. c. 15 (see ss. 4 and 5) was founded was that such property did not pass to the executors as such: see Hanson on the Death Duties, 4th ed. p. 272, as to the effect of the Act, which was passed in consequence of the decision in *Drake* v. *Attorney-General*. (3) It by no means follows that, because the appointed property becomes assets, it therefore passes to the executor as such. *In re Culverhouse* (4) is beside the question, because there could be no doubt that the leaseholds passed to the executor as such. The legal effect of a testamentary appointment is essentially different from that of a testamentary disposition. Suppose the testatrix had not exercised the power and had died intestate, the duty would fall upon the persons taking in default of appointment. Or suppose that the testatrix had exercised the power, and had died intestate as to her own estate, and had appointed no executor, would the mere fact that she had exercised the power throw the estate duty, not on the appointed fund, but on her own estate? "Executor" in s. 9, as in s. 8, of the Finance Act includes an administrator; therefore, if this fund comes to the executor as such, it must come to the administrator as such; but there is no authority for that proposition. Since *In re Hoskin's Trusts* (5) it is beyond dispute that the executor can insist upon having the fund paid to him, and he can give a good discharge for it; but the property does not pass to the executor as such, although the duty of administering the fund passes to him. Further,

(1) [1897] 2 Ch. 232.
(2) W. N. (1900) 9.
(3) (1843) 10 Cl. & F. 257.
(4) [1896] 2 Ch. 251.
(5) 6 Ch. D. 281.

we say that *In re Hoskin's Trusts* (1) was based upon *In re Philbrick's Settlement* (2), and is confined to the exercise of a power of appointment by a married woman. The dictum of James L.J. in *In re Hoskin's Trusts* (1), extending the principle of that case to the will of any person exercising a general power of appointment, was not necessary to the decision of the case, and is inconsistent with the reasoning of Lord Romilly in *In re Philbrick's Settlement.* (2)

The direction as to testamentary expenses does not throw the duty on the residuary estate. *In re Clemow* (3) is distinguishable, as that was a case of paying the testamentary expenses of another person, and there was there no question between beneficiaries of different funds; and in this case the testatrix has not said out of what fund the testamentary expenses are to come.

P. O. Lawrence, Q.C., in reply. After *In re Hoskin's Trusts* (1) it is very difficult to say that this fund does not pass to the executors as such. But, assuming otherwise, the duty is included in testamentary expenses, and upon the true construction of this will those expenses are directed to be paid out of residue.

Cur. adv. vult.

Aug. 3. KEKEWICH J. The argument on behalf of those interested in the residuary estate, who desire to throw the burden of the estate duty on the appointed fund, was mainly directed to the construction of s. 9, sub-s. 1, of the Finance Act, 1894, or, rather, to its application to the case in hand. In my opinion, the appointed fund did not pass to the executors as such. I have arrived at this opinion independently of the law as it stood before the date of the Finance Act, and to which I do not propose further to refer, but the arguments founded on that state of the law go to confirm it. The position of executors under a will exercising a general power of appointment must be treated as settled by *In re Hoskin's Trusts* (1) and *In re Philbrick's Settlement* (2), which was there referred

(1) 6 Ch. D. 281. (2) (1865) 34 L. J. (Ch.) 368.
(3) Ante, p. 182.

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to by Sir George Jessel M.R., and, having regard to what was said by James L.J. in *In re Hoskin's Trusts* (1), no distinction can be made between a power given to a married woman and one given to any other person. In *In re Philbrick's Settlement* (2) Sir John Romilly explained that when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees. Let me repeat that, after what was said by James L.J. in *In re Hoskin's Trusts* (1), this must be treated as applicable to a power exercised by any other person, and that, notwithstanding that what was said by Sir John Romilly is in language and in substance not strictly applicable to such a case. It was argued that executors appointed by will exercising a general power could not be held responsible if they did not look after the administration of the fund, and it was unfortunately lost, because they are only bound to require payment of the fund to them if required for the purposes of the will. I do not wish to conclude the question of their responsibility, but there is certainly room for contending that this argument is not consistent with the doctrine laid down in the cases cited. Nevertheless it seems to me that the appointed fund does not pass to the executors as such, and *In re Culverhouse* (3) does not decide that it does. There the property in question was leasehold specifically bequeathed, and the judgment proceeded on the title of the executor as explained in the passage in Williams on Executors there cited. Where there is an appointed fund, on the other hand, the executors do not take it by virtue of their office, but because, to again quote Sir John Romilly's language, the donee of the power must be considered to have appointed the property to the executors as trustees. On this point, therefore, I am in favour of those who say that the estate duty must be charged on the appointed fund.

On the other question, namely, whether the estate duty falls

(1) 6 Ch. D. 281. (2) 34 L. J. (Ch.) 368.
(3) [1896] 2 Ch. 251.

within the description of testamentary expenses, and must therefore be paid out of the residuary estate, I am in favour of those who say that it must be so paid. I must in this follow my own judgment in *In re Clemow*. (1) It was attempted to distinguish that case on the ground that there the direction was to pay the testamentary expenses of another person. That is true, and the distinction is of importance with reference to one of the points argued and decided in that case; but as regards the point with which I am dealing here, my judgment was based entirely on the reasoning that as payment of estate duty was essential to obtaining a grant of probate, that duty must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose.

Solicitors: *Wild & Wild; Crawford & Chester.*

(1) Ante, p. 182.

H. B. H.

COZENS-HARDY J.

1900

May 31.

In re H. H. VIVIAN & CO., LIMITED. METROPOLITAN BANK OF ENGLAND AND WALES, LIMITED *v.* H. H. VIVIAN & CO., LIMITED.

[1900 H. 1662.]

Company—Debenture—Floating Charge—Sale of Business—Injunction.

The objects of a company comprised the carrying on three distinct businesses, supplemental to one another. The Court refused, at the instance of debenture-holders having a floating charge on the whole undertaking, to restrain the sale of one business.

H. H. VIVIAN & CO., LIMITED, were incorporated by registration on June 16, 1899, with objects (inter alia)—

"(*a*) To acquire and take over from H. H. Vivian & Co., Limited, in liquidation, as a going concern (A) the business of a smelter and refiner of nickel, cobalt and other ores, and other businesses connected therewith, carried on at Hafod Isha Nickel and Cobalt Works, Swansea, in the county of Glamorgan; (B) the business of a german-silver and brass and copper tube and wire manufacturer, carried on at Icknield Port Road, Birmingham, in the county of Warwick; and (C) the business of a warehouseman and dealer in german-silver, brass and copper, and also the business of nickel-plating and stamping german-silver goods, carried on in George Street, Birmingham, aforesaid, and all or any the assets and liabilities of H. H. Vivian & Co., Limited, in liquidation; and in connection therewith to enter into the agreement mentioned in art. 3 of the company's articles of association, and to carry the same into effect, with or without modification.

"(*b*) To carry on the business of a smelter, crusher, refiner, manufacturer, maker, miner and dealer of and in ores, metals, coins, merchandise and produce, and manufactured and unmanufactured goods, articles and things, or either of them, and to sell and purchase, raise, export and import, and deal in ores, metals, manufactured or unmanufactured, and other articles of commerce."

"(*j*) To enter into partnership or into any arrangement for

sharing profits, union of interests, or co-operation with any person, partnership or company carrying on, or about to carry on, any business which this company is authorized to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company.

"(*k*) To take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of this company, or carrying on any business capable of being conducted so as directly or indirectly to benefit this company, and to lend money to and to guarantee the contracts of, or otherwise assist any person, partnership or company having dealings with this company, or carrying on any such business as aforesaid."

"(*n*) To sell, improve, manage, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property of the company."

The plaintiffs sued on behalf of themselves and all other holders of debentures issued by H. H. Vivian & Co., Limited, in June, 1898. By the debentures themselves the company charged all their assets by way of floating security in favour of the debenture-holders, but so that the company was not to be at liberty to create any mortgage or charge on its freehold and leasehold land in priority to or ranking pari passu with the series of debentures. A covering deed of even date was also executed by which the company conveyed and assigned freeholds at Birmingham and the leasehold premises at Swansea, where they carried on their smelting, to trustees for their debenture-holders. The covering deed reserved to the company power to sub-lease the Swansea premises for not more than three years. The company covenanted to carry on and conduct their business in a proper and efficient manner. The debentures the plaintiffs held were issued to them by way of security contemporaneously with the execution of the covering deed. Another deed of even date between the plaintiffs and H. H. Vivian & Co., Limited, was executed, which defined the terms on which the debentures were held as security. The smelting works had recently been carried on at a loss. The two businesses at Birmingham were remunerative.

COZENS-HARDY J.

1900

H. H. VIVIAN & Co., LIMITED, *In re.* METROPOLITAN BANK OF ENGLAND AND WALES, LIMITED *v.* H. H. VIVIAN & Co., LIMITED.

At an extraordinary general meeting of the company held on April 5, 1900, the shareholders passed the following resolution :—

"That the board of directors of the company be authorized to transfer, sell, or otherwise deal with the business of the company carried on at Swansea, South Wales, together with its stock-in-trade, stocks, stores, loose plant, and book debts relating to such business to the Anglo-French Nickel Company, Limited, or to any other company, persons or person, upon such terms as the directors may deem expedient; also that the board of directors of the company be authorized to sell, lease, or let on hire, or otherwise deal with the company's freehold and leasehold premises and works at Swansea, together with the fixed plant and machinery thereon to the Anglo-French Nickel Company, Limited, or to any other company, persons or person, upon such terms as the directors may deem expedient; and further that the board of directors of the company be authorized to transfer, sell, lease, let on hire, or otherwise deal with the company's property in Canada known as the Murray Mine, upon such terms as the directors may deem expedient."

The defendants were H. H. Vivian & Co., Limited, the Anglo-French Nickel Company, Limited, and the trustees of the covering deed. The plaintiffs now moved to restrain H. H. Vivian & Co., Limited, from selling to the defendant, the Anglo-French Nickel Company, Limited, or otherwise disposing of the business of the joint company carried on at Swansea, together with the stock-in-trade, stocks, shares, loose plant, and book debts belonging to the business without making due provision for the payment of the outstanding debentures, or in the alternative for a receiver.

Eve, Q.C., and *Seddon*, for the plaintiffs. The proposed transaction is not in the ordinary course of business of the defendant company. They propose to destroy a business which is a part of the security of the debenture-holders; not only are they seeking to deprive the debenture-holders of the security of these assets, but nothing tangible is substituted for them; they are selling to a new company, not substituting any tangible

security, but taking shares in another company which will itself pledge to other debenture-holders these very assets; the effect is practically to enable the company to take a part of the security from one set of debenture-holders and give them to a new set of mortgagees. The case is within the recent decision of North J. in *In re Borax Co.* (1)

Martelli, for the trustees of the covering deed.

Hon. E. C. Macnaghten, Q.C., and *George Lawrence*, for the defendant company. The company have power to dispose of their assets subject to a floating charge, provided they do not prevent themselves from substantially carrying out their objects: *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (2)

In *In re Borax Co.* (1) the defendant company were dealing with their whole undertaking. Here the defendants are acting no less for the benefit of the debenture-holders than the shareholders, whose interests in this matter are identical, in getting rid of a failing branch of the business to enable them the more profitably to carry on the other and prosperous branches. There is no objection to the company's taking shares in the new company, for they are expressly authorized by their memorandum to do so.

Eve, Q.C., in reply.

COZENS-HARDY J. In my opinion this motion ought to fail. The plaintiffs are the holders of debentures of H. H. Vivian & Co., Limited. The debentures are, in the first place, charged upon specific property. This is not material for the purpose of this judgment. The debentures are also charged on all the present and future property of the company, but only as a floating security. Looking simply at the terms of the debentures, I think the rights of the holder of a debenture of that kind cannot be better or more accurately defined than in the language used by Lord Macnaghten in the case to which my attention has been called. (3) There is a general charge upon

(1) [1899] 2 Ch. 130.
(2) [1897] A. C. 81.
(3) *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.*, [1897] A. C. 86.

COZENS-HARDY J.
1900
H. H. VIVIAN & Co., LIMITED. *In re.* METROPOLITAN BANK OF ENGLAND AND WALES, LIMITED *v.* H. H. VIVIAN & Co., LIMITED.

the undertaking as a whole, not attached to specific assets, and the company is at liberty, so long as the undertaking is continued, to deal with all assets not specifically charged in the ordinary and proper course of its business. But then it is said—and for the moment I was impressed by this argument—that there are three businesses here charged, and the company has no right to assign or destroy a business the subject of a floating security. But I think the answer to that is that there is only one undertaking, and there is really only one business of the company. That is the language used in the articles of association of this company, which treat the undertaking as comprising one business only. By art. 98, "The management of the business of the company shall be vested in the board." Now, what is the business of the company or the undertaking of the company? It consists of three branches, two at Birmingham and one at Swansea; precisely the same class of work is not done at each of these three places, but they are all part of one business carried on by the company. It is that business which by the trust deed the company covenants to carry on and conduct in a proper and efficient way.

Now, is it or is it not consistent with the carrying on of the business of the company in a proper manner to dispose of the stock-in-trade and plant of one of the branches of that business, the other branches of the business being carried on, not nominally, but largely and profitably? Now, the directors in the exercise of their discretion have come to the conclusion that it is to the interest of the company to get rid of this stock-in-trade and plant at Swansea, and they do what the trust deed expressly authorizes them to do—lease this very property for three years. They propose to sell it to the Anglo-French Nickel Company, to whom they will grant this lease. It is true that they propose to take in exchange for the chattels shares in the company, not cash. I may observe that no complaint is made of that on this motion, and I am not sure that any complaint could possibly be made, because, having regard to the two clauses of the memorandum of association that have been referred to, I think the company can do

directly what undoubtedly they could do indirectly—that is to say, they can take the shares directly instead of first taking the cash, and then reinvesting that cash in the shares of the company. I can find nothing in the debenture itself, or in the trust deed, or in the deed of even date, which prevents the directors of this company doing in good faith that which they are doing. No doubt what they are doing is depriving, in one sense, the debenture-holders of a part of their security; but, unfortunately, they have taken a security without guarding themselves against this incident. In the view which I take, the motion is wrong, and I must dismiss it with costs.

COZENS-HARDY J.
1900
H. H. VIVIAN & Co., LIMITED, *In re.*
METROPOLITAN BANK OF ENGLAND AND WALES, LIMITED *v.* H. H. VIVIAN & Co., LIMITED.

Solicitors: *Burton, Yeates & Hart, for Johnsons, Barclay & Lowe, Birmingham; Hollams & Co.*

D. P.

SACCHARIN CORPORATION *v.* REITMEYER & CO.

COZENS-HARDY J.
1900
June 22, 23, 24; *July* 6.

[1897 S. 4149.]

Letters Patent—Construction—"Exercise"—English Sale—Delivery Abroad.

An English merchant, who, in pursuance of a contract made in England, delivers a patented article at a foreign port to an English importer, does not make, use, exercise, or vend the protected invention within the realm.

THE plaintiffs in this action claimed damages for alleged infringements by the defendants of a patent, granted (as a communication from abroad by P. Monnet) in 1894 for improvements in the manufacture of toluene-sulpho chlorides, in connection with the importation into this country of saccharin alleged to have been made from ortho-toluene-sulpho chloride manufactured in accordance with Monnet's patent. That the dealing in this country with saccharin made from ortho-toluene-sulpho chloride so manufactured is an infringement of Monnet's patent has been decided by Buckley J. in the case of *Saccharin Corporation* v. *Anglo-Continental Chemical Works*. (1)

(1) W. N. (1900) 95; 17 Rep. Pat. Cas. 307.

COZENS-HARDY J.

1900

SACCHARIN CORPORATION v. REITMEYER & Co.

The judge held that one and only one of the several parcels of saccharin mentioned in the plaintiffs' particulars of infringement was proved to have been made from a toluene-sulpho chloride made in accordance with Monnet's patent.

This parcel had been purchased in Germany by the defendants as commission merchants carrying on business under the name "Reitmeyer & Co." in England, and delivered at a German port to the Chemical and Drugs Company, Limited, an English company, who imported it to England and sold it to persons in England. The defendants acted in pursuance of an order received in England. The plaintiffs have obtained judgment against the Chemical and Drugs Company in respect of infringement of Monnet's patent. The plaintiffs alleged that the Chemical and Drugs Company was insolvent.

Moulton, Q.C., *Cripps*, Q.C., and *J. Graham*, for the plaintiffs. On the evidence the saccharin in question, or at least some of it, is made from ortho-toluene-sulpho chloride manufactured under Monnet's process for which the plaintiffs hold the English patent. The saccharin can only be made by the use of that substance, and the manufacture, sale, or other use of such saccharin in England is an infringement of the patent, and has been so held to be by Buckley J. with respect to this very substance in the case of *Saccharin Corporation* v. *Anglo-Continental Chemical Works.* (1)

The defendants, by carrying on an agency business in this country for the purchase and sale of an article manufactured in accordance with the patent (at any rate, where the customer is resident in England and the article is delivered abroad for importation into England), have vended and exercised (we rely specially on the word "exercise") the invention within the realm: *Elmslie* v. *Boursier* (2); *Von Heyden* v. *Neustadt.* (3) *Grainger & Son* v. *Gough* (4) is a case—perhaps the only case—in which the word "exercise" has been construed. It was there held that a foreign merchant does not, by canvassing

(1) W. N. (1900) 95; 17 Rep. Pat. Cas. 307.
(2) (1869) L. R. 9 Eq. 217.
(3) (1880) 14 Ch. D. 230.
(4) [1896] A. C. 325.

through agents in the United Kingdom, so long as contracts were not made here, exercise a trade within the kingdom within the meaning of the Income Tax Acts, the test being where the contracts are made.

Lord Robert Cecil, Q.C., and *A. J. Walter*, for the defendants. If it can be proved that the defendants have bought and sold saccharin made from an article which was made under Monnet's patent there has been no infringement. A vendor of a substance made from ingredients one of which happens to be made in infringement of a patent is not liable; it is not his duty to see that no ingredient of the substance he deals in has been made under any patent without authority.

[COZENS-HARDY J. I consider myself bound by the decision of Buckley J.]

Buckley J. in the evidence before the Court in this action might have decided differently. If we are wrong on this point, what the defendants have done is not a use or exercise of the invention in this country: *Townsend* v. *Haworth* (1); *Sykes* v. *Howarth* (2); *Wegmann* v. *Corcoran*. (3) What they have done is far short of what the defendants did in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* (4), where it was held that foreign makers did not infringe an English patent by transmitting an infringing article through the post.

Moulton, Q.C., in reply.

July 6. COZENS-HARDY J. This is an action in which the plaintiffs claim damages for the infringement of Monnet's patent of 1894. The plaintiffs in their particulars rely upon the importation of a parcel of saccharin purchased by the defendants from M. Cerckel in June, 1897, and imported into this country and sold by the defendants. The defendants admit this importation and sale. As to this part of the case, it is sufficient for me to say that it is not proved that the saccharin in question was made according to the Monnet patent; and that, on the contrary, it has been proved to my satisfaction that it was made by a different process. So far, therefore, as relates to

(1) (1875) 12 Ch. D. 831, n.
(2) (1879) 12 Ch. D. 826.
(3) (1879) 13 Ch. D. 65.
(4) [1898] A. C. 200.

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1900

SACCHARIN CORPORATION v. REITMEYER & Co.

this part, the plaintiffs' action wholly fails, and, whatever may be the ultimate result of the action, regard must be had to this in dealing with costs.

The plaintiffs also rely in their particulars upon the defendants' transactions with reference to certain parcels of saccharin which were ordered by the defendants as commission agents or merchants in 1897 from certain persons on the Continent, and were delivered by the vendors at foreign ports direct to the order of the Chemical and Drugs Company, Limited, of Manchester, the purchasers. The orders were given by the Chemical and Drugs Company to the defendants in England. The goods were contracted to be delivered, and were in fact delivered, to the company at Continental ports. The defendants got their profit as commission agents or merchants in respect of the transactions. As to these parcels, the question is entirely different. The defendants in the first place assert that the plaintiffs have not proved that the stuff was manufactured according to Monnet's patent. I have had the evidence of a German chemist from whose works one of the cases was procured, and although his evidence was not altogether satisfactory by reason of his refusal to state the details of the manufacturing process adopted by his firm, I think I must hold, in the absence of any evidence to the contrary, that the plaintiffs have established that this one case of saccharin was manufactured according to Monnet's patent as interpreted by Buckley J. in the recent case of *Saccharin Corporation* v. *Anglo-Continental Chemical Works*. (1) The evidence does not satisfy me except as to this one case.

The defendants next contend that even if Monnet's process were adopted, yet there is no infringement, because Monnet's patent is not one for the manufacture of saccharin, but only for the manufacture of toluene-sulpho chlorides, a chemical substance used in the manufacture of saccharin, but also used for other purposes, and not contained as such in saccharin. The defendants contend, with great plausibility, that a new terror will be added to life if every person is held to infringe Monnet's patent who uses an article imported from

(1) W. N. (1900) 95; 17 Rep. Pat. Cas. 307.

abroad in the course of the production of which saccharin derived from a chemical substance produced according to Monnet's process may have been employed. It seems to me, however, that this point has really been decided against the defendants and in favour of the plaintiffs by Buckley J. in the case to which I have referred, and I therefore propose to adopt his view without expressing any opinion of my own.

Assuming, then, that the importer into this country of the saccharin infringed Monnet's patent, the further question arises whether the defendants have infringed. Now it is plain that a patent is of local force. It cannot and does not profess to interfere with or control acts done abroad, and it is for the plaintiffs to prove that what the defendants have done brings them within the reach of the law. The patent is in the common form scheduled to the Act of 1883. It confers upon the patentee the sole privilege and authority "to make, use, exercise, and vend" the invention within the United Kingdom and the Isle of Man. Of these four words, "make, use, exercise, and vend," it is admitted that the defendants have not "made" or "used," and I think it is clear that they have not "vended" within the jurisdiction: see *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*. (1) It is said, however, that they have "exercised" the invention within the jurisdiction. It is remarkable that this word, which has been found in letters patent at least since 1621, so far as I am aware, has never been construed. I think, however, that it can only mean "put in practice." I do not think it can be taken to cover a transaction such as I have to deal with. The defendants as commission agents contracted for delivery to the purchasers at a German port. They had no interest whatever in the case when delivered at the foreign port to the purchasers. They had no right to control its destination. I assume that they knew or suspected that the greater part of the stuff would find its way into this country; but I cannot regard that as material. The acts done by the defendants on the Continent were lawful there, and—being done on the Continent—were not unlawful here. The plaintiffs have sought to extend the principle laid down in *Elmslie* v. *Boursier* (2) and

(1) [1898] A. C. 200. (2) L. R. 9 Eq. 217.

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1900

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Von Heyden v. *Neustadt* (1), that the importation into and sale in England of an article manufactured abroad according to a process protected by an English patent is an infringement of the English patent, to a case where the defendants have neither imported into nor sold in England.

The plaintiffs have attempted to create a prejudice in their favour by asserting that the purchasers to whom the stuff was delivered were, and were known by the defendants to be, a company possessing no capital. But this seems to me wholly irrelevant to any question I have to decide. This is not an action based upon a charge of fraud or conspiracy. It is an action based solely upon infringement of a patent, as to which scienter is immaterial. The plaintiffs have sued and obtained judgment against the Chemical and Drugs Company. They have sued, or they may sue, the persons who bought from that company in England. They now attempt to sue the defendants. I am not disposed for the first time thus to extend the rights of a patentee. In my judgment, the plaintiffs' action wholly fails, and I must dismiss it with costs.

Solicitors: *J. H. & J. Y. Johnson; Deacon, Gibson & Medcalf.*

(1) 14 Ch. D. 230.

D. P.

In re GUTTA PERCHA CORPORATION.

COZENS-HARDY J.

1900

July 10, 11.

[00191 of 1900.]

Company—Winding-up—Shareholder's Petition for Compulsory Order—Effect of Voluntary Winding-up.

A petition for a compulsory winding-up order was presented by a fully paid shareholder who was supported by a considerable number of the other shareholders. Resolutions for voluntary winding-up had been passed with a view to a reconstruction, which had, however, proved abortive at the time of the hearing of the petition. There were also matters which appeared to require investigation:—

Held, that a compulsory winding-up order must be made, and that, in arriving at that conclusion, the fact that the voluntary winding-up was not an ordinary one, but was resolved upon with the view to a specific object which had failed, was a reason strongly influencing the Court.

THE Gutta Percha Corporation, Limited, was, in October, 1897, registered under the Companies Acts with a capital of 200,000*l.* in shares of 1*l.* each. Its objects were, amongst other things, to acquire by purchase and work letters patent for a process for extracting gutta percha, and for those purposes to adopt an agreement made on August 16, 1897, between Ernest Stainer and H. P. Smith for the sale by the former to the company of certain patents and patent rights in connection with the process.

By clause 3 of the agreement Stainer was to procure responsible persons to subscribe for not less than 30,000*l.* of preference shares, at par, in the capital of the company, and pay 2*s.* 6*d.* per preference share upon application, and the balance as called up, of which 20,000*l.* was to be allocated for working expenses.

By clause 4 the consideration to be paid by the company to Stainer was to be 120,000*l.* for the patents and patent rights, and 30,000*l.* for other things, making a total of 150,000*l.* payable in cash and fully paid shares.

By clause 5 the company was to proceed to allotment upon a subscription of 30,000*l.*, of which 20,000*l.* was to be allocated as working capital as aforesaid.

The agreement was adopted by the company by another agreement dated December 15, 1897, subject to the modification

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that the sum of 10,000*l.* was substituted for the 20,000*l.* to be appropriated as working capital.

Early in 1899 the directors invited subscriptions for debentures for 7500*l.*, but the only person who applied was Sir E. Thornton, the chairman of the company, who advanced to the company 4141*l.* 13*s.* 4*d.*, for which he received 362 debentures of 20*l.* each.

On December 15, 1899, and January 9, 1900, special resolutions were passed and confirmed for the voluntary winding-up of the company, the appointment of a liquidator, and the sale of its assets to a new company, to be formed and called the New Gutta Percha Corporation, upon the terms of a reconstruction agreement.

A circular accompanying the notice of the first meeting to pass the special resolution stated that the funds available for the working of the company had been exhausted, and that it had been found impossible to provide further funds.

A circular accompanying the notice of the second meeting, after referring to what had been done at the first meeting, stated that under the arrangements that had been tentatively made there would be a full 10,000*l.* left for working capital.

Owing to certain irregularities and to avoid any question as to the validity of the special resolutions, further special resolutions to the same effect were passed and confirmed at meetings held on February 12 and 27, 1900.

The proposed reconstruction ultimately fell through, as it was found impossible to secure the necessary further capital.

In an action commenced by Sir E. Thornton, the only debenture-holder, to enforce his debentures, a receiver and manager was appointed on November 23, 1899, and on April 30, 1900, an order was made in that action for the sale of all the company's assets, the sale being advertised to take place on July 11, 1900.

Thomas James, the holder of 100 fully paid shares in the company, presented a petition asking that it might be wound up by the Court, and by his petition he alleged (amongst other things) that the sums received for subscriptions for shares amounted to 21,762*l.*, of which 17,583*l.* 9*s.* 6*d.* was paid to the vendor, leaving only 4178*l.* 10*s.* 6*d.* for working capital; that

the vendor had not fulfilled and had never been required to fulfil his contract to subscribe for not less than 30,000 preference shares at par; that since its incorporation the company had done no business, the total sales shewn in an approximate balance-sheet sent to the shareholders amounting to 14*l.* only; that notwithstanding 30,000*l.* was the price paid by the company for certain stocks of gutta-percha leaves and other things, the stock of leaves, chemicals, and gutta percha in hand on December 30, 1899, was in the approximate balance-sheet stated to be of the estimated value of 800*l.* only, and that no information had been given to the shareholders accounting for the deficiency in value of the stock, having regard to the fact that the total sale in two years had been only 14*l.*

The petition was supported by a large number of shareholders.

The company alleged that the assets were insufficient to satisfy the claims of the debenture-holder, and that no benefit could result to any one by making a winding-up order.

Eve, Q.C., and *M. Muir Mackenzie*, in support of the petition. The existence of the voluntary winding-up is not an absolute bar to a shareholder's petition for a compulsory winding-up, especially where other shareholders support it. No doubt, an ordinary voluntary winding-up is primâ facie a bar to his petition; but in the present case circumstances exist which shew that such an inquiry is necessary as can only be obtained under a compulsory order, and that the result of such inquiry will probably be that something may be obtained for the creditors and shareholders. Moreover, this is not an ordinary voluntary winding-up, but a liquidation entered on with a certain object—the reconstruction of the company—which has failed.

Hon. E. C. Macnaghten, Q.C., and *Clauson*, for the company and the liquidator. It has long been well settled that, as a general rule, after resolutions have been passed for a voluntary winding-up, a shareholder cannot obtain a compulsory winding-up order, or even a supervision order: *In re Gold Co.* (1) If fraud is proved, that furnishes an exception to the rule, but

(1) (1879) 11 Ch. D. 701.

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fraud is not alleged in the present case. The existence of the voluntary winding-up is a strong reason why the Court should decline to interfere, although circumstances may justify interference: *In re Haycraft Gold Reduction and Mining Co.* (1) But no circumstances sufficient to justify a compulsory order are shewn in the present case. If misfeasances have taken place, proceedings to obtain relief may be taken by a shareholder in the voluntary winding-up.

No possible good to any one can result from a winding-up order, for the assets when realized will be insufficient to satisfy the claims of the debenture-holder.

Muir Mackenzie, in reply.

COZENS-HARDY J. This is a petition, by a shareholder holding 100 fully paid shares in the company, for a compulsory winding-up order. He is supported by a very considerable body of shareholders holding 6900 shares in all, which, with his own, make 7000 shares. The objection that is taken by the company—no shareholders as such appearing to oppose the petition—is that a voluntary winding-up was resolved upon and is now in progress. Primâ facie, that is a serious difficulty for the petitioner to get over; but, upon the whole, I think that it is not a sufficient answer to this petition. I will state shortly the reasons which have led me to that conclusion. It appears from the evidence of Sir Edward Thornton, who was from the first to the last the chairman of this company, that the affairs of the company had, if I may use the expression, been mismanaged to an extent almost beyond belief. It is not disputed that the vendor to the company had not fulfilled the obligations which he had entered into, but that nevertheless the directors of the company at a very early stage—how early I do not know—actually proceeded to pay to him a very large sum of money, although he was liable to the company for the non-fulfilment of the obligations which by the contract he had entered into. I think that is a matter which pre-eminently requires a searching public investigation, which can only be obtained by means of a compulsory winding-up order. But the matter

(1) Ante, pp. 230, 237.

does not rest there. Stock—I am using that term in a very general sense, but I think in the sense in which it has been used—was purchased by the company to the extent of, I think, 30,000*l.* or thereabouts. The company went on from 1897 to the beginning of this year; and what do I find? The total proceeds of its sales amounted only to 14*l.*, and yet it was stated that the stock in hand was valued at 800*l.* only. What is the explanation of this? What has become of the rest of this 30,000*l.*? I think it is pre-eminently a case in which a public investigation is desirable.

And there is another reason why I think a public investigation is required. Sir Edward Thornton, according to the evidence, put about 4000*l.* into the till of the company, and took debentures at a much higher figure. He took debentures of the nominal amount of about 7200*l.* for his advance of about 4000*l.*, and in respect of his position as the sole debenture-holder of the company he commenced, before the winding-up began, a debenture-holder's action. I am told that in that debenture-holder's action an order has been made for the sale of the assets of the company, which are said not to be sufficient to produce the amount due on the debentures. But on the present materials there is, as it seems to me, a very strong primâ facie case that Sir Edward Thornton is himself liable to make good to the company the amount which was paid away to the vendor, and the effect of that would be that, instead of being in the position of a debenture-holder entitled to sweep up all the assets of the company, there would be nothing practically due to him, and there being, as I understand, no ordinary creditors of the company, the assets, such as there might be, would be available for the shareholders. Any money which is obtained, whether from the vendor or from the directors of the company, will have to be returned to the shareholders. Assuming that I have, as I believe I have, jurisdiction to make a compulsory order notwithstanding the voluntary winding-up, I think that this is a case surrounded with so much suspicion, and so pre-eminently requiring investigation, that I ought to make a compulsory order.

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GUTTA PERCHA CORPORATION, *In re.*

There is another reason which has influenced me very much in arriving at this conclusion, and it is this—that the voluntary winding-up, such as it is, was not a voluntary winding-up of the ordinary kind and under ordinary conditions. The shareholders were told, "There is a reconstruction scheme under which there will be fully 10,000*l.* left for working capital, the liability of 3*s.* per share in the reconstructed company is to be payable in certain instalments, and you, the shareholders, who find yourselves in a company which can only be described as waterlogged, will be shareholders in a new company possessing ample working capital." On the faith and footing of that statement, and obviously only for the purpose of giving effect to that reconstruction, resolutions for voluntary winding-up were passed, and the resolutions themselves proceeded to authorize the liquidator to consent to the registration of a new company with much the same title, and to approve of the draft agreement submitted to the meeting and expressed as intended to be made between this company and its liquidator of the one part and a trustee for the new company of the other part, and to authorize the liquidator to enter into an agreement on the terms of the draft, and to carry the same into effect with such (if any) modifications as he might think fit. It is conceded that that reconstruction scheme has fallen to the ground. The very foundation of the voluntary winding-up has gone. This was not a case in which the shareholders of the company were honestly minded to simply wind up a company which could not go on to advantage, but it was a winding-up only resolved upon as part of a scheme for reconstruction, which scheme of reconstruction has proved wholly abortive.

I do not, therefore, regard a winding-up of that nature as one which throws any such difficulty in the way of a compulsory order as an ordinary winding-up might do. For these reasons I make the usual compulsory winding-up order, and the usual order as to costs.

Solicitors for petitioner: *Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for company and liquidator: *Lawrance & Webster.*

F. E.

In re METROPOLITAN FIRE INSURANCE COMPANY.

COZENS-HARDY J.

1900

July 11, 17.

WALLACE'S CASE.

Company—Reconstruction—Winding-up—Contributory—Application for Shares—Withdrawal before Allotment.

By a reconstruction or amalgamation agreement the C. Company and its liquidators agreed to transfer its goodwill and assets to the M. Company, part of the consideration for the transfer being that every member of the C. Company should, in respect of each share therein held by him, "be entitled as of right to claim an allotment" of either a debenture bond, or two ordinary shares of 5*l.* each in the M. Company credited with 1*l.* per share paid up, and the agreement provided that the M. Company should, within a month from the date of the agreement, allot and issue the bonds and shares claimed, subject to this, that it should not be bound to allot shares to any one to whom under its articles it could have objected as a transferee of shares. The agreement further provided that a claim must be made within twenty-one days from the date thereof by sending in to the M. Company or to the liquidators of the C. Company a signed claim in writing, and that the liquidators should within seven days from that date give notice in writing to each member of the C. Company stating the number of bonds or shares which he was entitled to claim as of right, with proper forms of claim. The liquidators duly gave notice to W., a shareholder in the C. Company, who within the twenty-one days signed a document, addressed to the directors of the M. Company, claiming an allotment of ten ordinary shares with 1*l.* per share paid up, and agreeing to accept the same and to pay the further moneys payable thereon when called upon. Before any acceptance of the offer or the allotment of the shares subsequently made, W. wrote to the M. Company withdrawing his application. In the subsequent winding-up of the M. Company the liquidator of that company sought to have W. retained on the list of contributories in respect of the ten shares:—

Held, that the document sent to W. was an application which could be withdrawn by him before acceptance, and not an acceptance of a prior offer by the M. Company, and that he was not liable as a contributory.

THE Commercial Fire Insurance Company of Scotland, Limited, below called "the Commercial," was wound up voluntarily in April, 1898, all its assets being transferred to the Metropolitan Fire Insurance Company, Limited, below called "the Metropolitan," upon the terms of an agreement dated April 14, 1898, and made between the Commercial and its liquidators of the one part and the Metropolitan of the other

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part. By this agreement the Commercial and its liquidators agreed to transfer and make over to the Metropolitan all the goodwill and assets of the Commercial. The consideration for the transfer was partly an undertaking to pay and discharge all the debts and obligations of the Commercial, next an indemnity against all the costs of the winding-up of the Commercial, next the taking over of the whole staff of the Commercial. Then followed these clauses: "(5.) As a further part of the consideration for the said transfer every member of the Commercial shall, in respect of each share therein held by him or her, be entitled as of right to claim an allotment to himself or herself or to his or her nominee or nominees of either (first) a debenture bond for 1*l.* 10*s.* carrying interest at the rate of 4 per cent. per annum as from the 14th day of February, 1898, or (second) two ordinary shares of the Metropolitan of 5*l.* each, with the sum of 1*l.* credited as paid up on each of such shares, and the Metropolitan shall forthwith and within one month from the date hereof allot and issue the debenture bonds and shares so claimed, subject, however, to this condition—that the Metropolitan shall not be bound to allot shares under this agreement to any one to whom under their articles of association they could have objected as a transferee of shares." "(7.) A member of the Commercial entitled to claim an allotment of debenture bonds or of shares of the Metropolitan in terms of clause 5 hereof must claim the same within twenty-one days from the date hereof by sending in to the Metropolitan or to the liquidators of the Commercial a claim in writing for an allotment of the debenture bonds or the shares as they may elect, and such claim must be signed by the member making the same, and, when it requests that an allotment of shares may be made to a nominee or nominees of such member, it must be countersigned by such nominee or nominees. (8.) The liquidators of the Commercial shall, within seven days from the date hereof, give notice in writing to each member of the Commercial, stating the amount of debenture bonds and the number of shares which the member is entitled to claim as of right under this agreement and the time within which the claim for an allotment as aforesaid must be sent in, and there

must be inclosed therewith proper forms of claim for debenture bonds and for shares addressed to the Metropolitan for signature by the member. The notice aforesaid shall in each case be given by sending the same through the post addressed to the member at his or her registered address as appearing on the register of members. (9.) Members of the Commercial, other than dissentient members hereinafter mentioned, entitled to claim as aforesaid, but who shall not within the period of twenty-one days before mentioned claim, shall be held to have elected to claim debenture bonds, and the liquidators shall immediately on the expiry of said twenty-one days nominate all such members other than dissentient members who do not claim for an allotment of the debenture bonds, which they are respectively entitled to claim under clause 5 hereof, and the Metropolitan shall forthwith allot such debenture bonds to the nominees of the liquidators." And by clause 10 provision was made for the payment, so far as necessary, by the Metropolitan of the amount payable to any dissentient members of the Commercial.

The liquidators sent a notice to T. N. Wallace, a shareholder in the Commercial. It was not forthcoming, but the Court presumed that it was in pursuance of clause 8. Wallace on April 23, 1898, signed a document addressed to the directors of the Metropolitan, which, so far as material, was as follows: "As the holder of five shares in the Commercial, I claim an allotment of ten ordinary shares of the Metropolitan of 5*l.* each credited as paid up to the extent of 1*l.* per share, being the proportion to which I am entitled under the agreement, and I hereby agree to accept such shares and to pay the further moneys payable thereon when called upon." On July 2 Wallace wrote to the Metropolitan withdrawing his application for ordinary shares. This was acknowledged by the general manager on July 6. Wallace's letter was forwarded by the Metropolitan to the liquidators of the Commercial, who on July 8 wrote a reply to Wallace, treating him as entitled to debentures instead of shares. Notwithstanding this, the shares were allotted to Wallace in the autumn of 1898.

In January, 1900, an order was made for the winding-up of

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the Metropolitan, and in the winding-up the liquidator placed the name of Wallace on the list of contributories in respect of the ten ordinary shares.

Wallace took out a summons asking that his name might be struck off the list, and the summons was adjourned into court and heard before Cozens-Hardy J. on July 11, 1900.

Herbert Jacobs, for the applicant. The ordinary law of contracts is applicable. The application, which was a mere offer, was withdrawn before any acceptance or allotment was made, and, therefore, there was no contract by the applicant to take the shares. The two decided cases which most resemble this are both distinguishable. In *Adams' Case* (1) the application was not withdrawn until after allotment and notice thereof, and the withdrawal was, therefore, too late. In *Brown's Case and Tucker's Case* (2) the document sent in by the shareholder was the acceptance of an offer previously made by the company, the shares of which were the subject of both documents. In the present case the document sent to the applicant was sent by the liquidators of the vendor company, not by the company issuing the shares, and the agreement between the companies cannot be regarded as an offer.

The present case is not within either of the cases.

Whinney, for the liquidator of the Metropolitan. The transfer was made under s. 161 of the Companies Act, 1862, and the agreement may provide that the shares shall be allotted directly to the shareholders of the selling company: *In re City and County Investment Co.* (3)

The agreement is, in all its material parts, in the form usually adopted. The liquidators of the selling company were either appointed the agents of the shareholders of that company by the resolutions of that company, or they were by the agreement made the agents of the purchasing company which was offering the shares, and which offer was accepted by the document sent in by the applicant. That acceptance of the agent's offer made the contract to take shares binding, and no

(1) (1872) L. R. 13 Eq. 474. (2) (1871) 41 L. J. (Ch.) 157.
(3) (1879) 13 Ch. D. 475.

acceptance or allotment on behalf of the purchasing company was necessary. After the acceptance either the applicant or the purchasing company could have obtained specific performance of the contract. If there was no contract, the applicant by his laches and acquiescence has lost the right to relief: *Wynne's Case.* (1)

Jacobs, in reply. There is nothing to shew that the liquidators of the selling company were the agents of the purchasing company. Clause 5 of the agreement for transfer shews that the offer to take shares might be rejected, and that it was, therefore, nothing but an offer.

Cur. adv. vult.

July 17. COZENS-HARDY J. (after stating the facts as above set out). The question for my decision is whether the allotment was valid. The answer must, I think, depend upon this: Was the document of April 23, 1898, an application which could be withdrawn before acceptance, or was it an acceptance of a prior offer made to him by the Metropolitan? Upon the whole, I think the former is the true view. There was no direct relation between the Metropolitan and Mr. Wallace prior to April 23. The contract of April 14, 1898, was made between the two companies, and the allotment of shares or the issue of debentures would have been a satisfaction pro tanto of the obligations entered into by the Metropolitan with the Commercial. I do not think that a shareholder in the Commercial can be deemed to have acquired any direct right under that contract as against the Metropolitan. It seems to me that it was open to the Metropolitan to refuse the application, and that, even if such refusal had been wrongful, the only persons who could have claimed compensation would have been the parties to the agreement. It has been argued that the liquidators must be deemed agents of the Metropolitan in sending the notice to Mr. Wallace, thus making it a notice by the Metropolitan; but there is nothing in the written documents to support this theory, and there is no evidence of agency apart from the documents. The reasoning of the Lords

(1) (1873) L. R. 8 Ch. 1002, 1015.

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Justices in *In re New Eberhardt Co.* (1) seems inconsistent with this view. The result, in my opinion, is that the application succeeds, and the applicant's name must be removed from the list of contributories, and the liquidator must pay the costs.

Solicitors for applicants: *Rowe & Maw.*
Solicitors for liquidator: *Amery Parkes & Powell.*

F. E.

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July 17, 18, 31.

In re WHITAKER. WHITAKER *v.* PALMER.

[1898 W. 2749.]

Administration—Voluntary Creditor—Insolvent Estate—Judicature Act, 1875, (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-s.* 4.

In the administration of an insolvent estate by the High Court voluntary creditors are paid pari passu with other creditors.
In re Maggi, (1882) 20 Ch. D. 545, discussed.

THIS was a claim in an action for administration of the estate of a deceased person by trustees of a voluntary settlement. The deceased by the settlement had covenanted with trustees to pay an annuity of 250*l.* during his own life, and a sum of 5000*l.* and interest in the meanwhile within six months of his death, to be held on trust for a lunatic son of the settlor. The claim was for a small sum in respect of the annuity and for the capital sum and interest. The master allowed the claim, and referred to the decision of the judge the question whether the trustees were entitled to be paid pari passu with the creditors for value.

Vernon Smith, Q.C., and *S. B. L. Druce*, for the claimants. The effect of s. 10 of the Judicature Act, 1875, is not to introduce the bankruptcy rules in administration actions so as to enlarge the estate: *In re Count D'Epineuil.* (2) But the rules

(1) (1889) 43 Ch. D. 118. (2) (1882) 20 Ch. D. 217.

for the distribution of the assets among the creditors pari passu according to s. 40 of the Bankruptcy Act are introduced: *In re Leng* (1); *In re Heywood*. (2) If the decision of Fry J. in *In re Maggi* (3) can stand with the decision of the Court of Appeal in *In re Leng* (1), it can only do so as an exception to the general rule, and it does not affect the principle applicable here. Debts paid pari passu in accordance with s. 40 of the Bankruptcy Act, 1883, include voluntary debts: *Ex parte Pottinger*. (4)

Eve, Q.C., and *Edward Ford*, for creditors for value. The whole bankruptcy practice as to debts provable is not introduced into the administration of insolvent estates of deceased persons by s. 10 of the Judicature Act, 1875. The rule that all creditors are to be paid pari passu is not imported. There can be no difference in principle in importing the bankruptcy rule of equality between judgment and other creditors and the bankruptcy rule of equality between voluntary creditors and creditors for value. Fry J. held in *In re Maggi* (3) that the bankruptcy rule was not imported in adjusting the rights between judgment and other creditors. That case stands as good law: it was recognised by the late Master of the Rolls, and not overruled by the other judges in *In re Leng*. (1)

Capron, for the executors of the deceased.

Vernon Smith, Q.C., in reply.

July 31. COZENS-HARDY J. This application raises the question whether in the administration of an estate which is insufficient for the payment in full of all debts voluntary debts ought to be postponed to debts for valuable consideration. It is beyond doubt that prior to the Judicature Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular, secured creditors were entitled to a dividend on the full amount of their debts, and voluntary bonds were postponed to other debts, whereas in the Court of Bankruptcy secured creditors only proved for the

(1) [1895] 1 Ch. 652.
(2) [1897] 2 Ch. 593.
(3) 20 Ch. D. 545.
(4) (1878) 8 Ch. D. 621.

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balance after valuing their securities, and all creditors, including judgment creditors, were paid rateably. Sect. 10 of the Judicature Act, 1875, altered the law to some extent. So far as material, it is as follows: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act." This section has given rise to much discussion. It has, however, been finally decided that the section does not in all respects assimilate the administration in the Chancery Division to the administration in bankruptcy. It does not augment or enlarge the assets to be administered. For this purpose the rules of bankruptcy have no application.

The precise extent to which the section alters the mode in which the assets are to be divided has to be considered. There are observations in some of the earlier cases to the effect that the object of the section was only to put an end to that which is known as the rule in *Mason* v. *Bogg* (1), the rule by virtue of which secured creditors proved without valuing their securities. In *In re Maggi* (2) Fry J. had to consider whether a creditor, who had recovered judgment against the executors as such, was entitled to be paid in priority to other

(1) (1837) 2 My. & Cr. 443; 45 R. R. 111. (2) 20 Ch. D. 545.

creditors, and he held that the section did not take away the priority of the judgment creditor. Fry J. says (1): "The question is whether, by force of s. 10, the provision of s. 32 of the Bankruptcy Act that, with the exceptions mentioned in it, all debts shall be paid pari passu, is imported into the administration of insolvent estates of deceased persons. This turns upon the construction which is to be given to the words 'the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.' If this means that only the bankruptcy rules as to the rights of secured creditors on the one hand, and of unsecured creditors on the other hand, are to apply, then s. 32 will not apply here, for that section relates to the rights of each class of creditors inter se. If, on the other hand, the words mean that the bankruptcy rules which regulate the rights of secured creditors inter se, of unsecured creditors inter se, and of the class of secured creditors as against the class of unsecured creditors, are to apply, then the provisions of s. 32 will apply. On the Act alone, independently of authority, I come to the conclusion that the narrower construction must be given to s. 10, and that it relates only to the rights of secured as against unsecured creditors considered as two conflicting classes of creditors, but that it does not affect the rights of members of each of the two classes of secured and unsecured creditors inter se." And after referring to the conflict of authorities, he says: "I think the weight of authority is in favour of my conclusion that s. 32 is not introduced into the administration of the estates of deceased persons. I am confirmed in my conclusion by the decision of the Court of Appeal in *Lee* v. *Nuttall* (2), that an executor's right of retainer is not affected by s. 10. If the effect of that section had been to introduce the rule that, with the exceptions mentioned in s. 32 of the Bankruptcy Act, all debts are to be paid pari passu, it is difficult to see how the priority given to an executor by means of his right of retainer could remain." If there had been no subsequent decision,

(1) 20 Ch. D. 549, 550. (2) (1879) 12 Ch. D. 61.

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I should, without hesitation, have accepted Fry J.'s view, but the true effect of s. 10 has since been considered by the Court of Appeal and by Stirling J. In *In re Leng* (1) the question was whether the claim of a widow for money lent by her to her husband for the purposes of his trade was to be postponed to the claims of his other creditors. Sect. 3 of the Married Women's Property Act, 1882, enacts that it shall be so postponed in case of the husband's bankruptcy, and the Court of Appeal held that it must be equally postponed in the administration of the husband's insolvent estate. The late Master of the Rolls, while recognising *In re Maggi* (2), seems to treat it as an exception to the general rule (3): "Two further rules have been settled, namely: First, that the common law right of an executor or administrator to retain a debt due to himself is not affected by s. 10 of the Judicature Act, 1875: *Lee* v. *Nuttall* (4); *In re May* (5); secondly, that this section has not deprived judgment creditors of their right to be paid in priority to other creditors in an administration action, although they have no priority in bankruptcy: see *Smith* v. *Morgan* (6) and *In re Maggi.* (2) In *In re Maggi* (2) Lord Justice (then Mr. Justice) Fry came to this conclusion. But in commenting on s. 10 of the Judicature Act, 1875, he seems to have overlooked the words, 'as to debts and liabilities provable,' and he considered that s. 32 of the Bankruptcy Act, 1869, which enacted that, subject to certain specified exceptions, all debts should in bankruptcy be paid pari passu, was not made applicable to administration actions. No doubt if that section were held applicable in all cases it would exclude the right of an executor to retain his own debt and would deprive judgment creditors of their priority. But these persons are entitled to preference on grounds peculiar to themselves, and the rules which favour them are rather exceptions to ordinary rules as to payment of debts than illustrations of those rules. Whilst I recognise the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy

(1) [1895] 1 Ch. 652.
(2) 20 Ch. D. 545.
(3) [1895] 1 Ch. 656.
(4) 12 Ch. D. 61.
(5) (1890) 45 Ch. D. 499.
(6) (1880) 5 C. P. D. 337.

which requires debts (with some exceptions) to be paid pari passu is not applicable in administration actions where the estate being administered is insolvent."

Smith L.J. seems to me to have expressed in no doubtful language his dissent from *In re Maggi*. (1) He says (2): "As regards swelling the assets to be distributed, it appears to me that the cases have decided that the law of bankruptcy does not apply; but as regards the distributing of the assets, i.e., as regards the proofs to be allowed, I find no case binding me to hold that the rules of bankruptcy do not apply. It is true that in 1882 Lord Justice (then Mr. Justice) Fry, in the case of *In re Maggi* (1), held that the bankruptcy rule that all debts shall be paid pari passu (s. 32 of the Bankruptcy Act, 1869) was not imported into the administration of insolvent estates, and that a judgment creditor took priority over creditors; and he placed what he termed the narrower construction upon s. 10 of the Judicature Act, 1875, and he held that it was confined to cases in which the rights of a class of secured creditors were conflicting with a class of unsecured creditors, and had no application to the rights inter se of the members of those classes. This is not a decision upon the conjoint operation of the two statutes which we have now to consider, and I therefore do not inquire if the learned judge's construction of s. 10 is not too narrow; and, moreover, the case does not bind me."

The result seems to be that, although in a court of first instance the priority of judgment debts may still have to be acknowledged as an exception, the general principle is that the bankruptcy rules ought to apply in dividing the assets of an insolvent estate. In the subsequent case of *In re Heywood* (3) Stirling J. held that the priority as to rates and wages conferred by the Preferential Payments in Bankruptcy Act, 1888, applies to the administration of insolvent estates in the Chancery Division. In this state of the authorities I think that I am bound to hold that voluntary debts must rank with other

(1) 20 Ch. D. 545. (2) [1895] 1 Ch. 661.
(3) [1897] 2 Ch. 593.

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debts precisely as they would in bankruptcy, and that the old rule of the Court of Chancery by which such debts were postponed must be regarded as abrogated by s. 10 of the Judicature Act, 1875.

Solicitors: *Gamlen, Burdett & Gamlen, for Cottrell & Son, Birmingham; Ridsdale & Son; Belfrage & Co., for Chaldecott, Dorking.*

D. P.

In re GREAVES' SETTLED ESTATES. JONES *v.* GREAVES.

FARWELL J.

1900

June 24.

[1900 J. 1370.]

Settled Estates—Term for raising Portions—Infants—Contingent Interests —Maintenance.

Where portions are given to younger children under a settlement made by a father, or other person standing in loco parentis, and the settlement contains no provision for the maintenance of the children, interest by way of maintenance for the children during minority will be allowed on their portions although their interests are contingent.

ORIGINATING SUMMONS.

By deed dated June 16, 1888, and made between J. Greaves (the father) of the first part, E. P. Greaves (the son) of the second part, A. Leaf (seisee to uses) of the third part, and Sir L. Jones and F. S. McMaster (trustees of a term) of the fourth part, real and leasehold estates were limited to the uses that, if E. P. Greaves should die in the lifetime of his wife M. J. Greaves, she should, after the death of E. P. Greaves, receive during her widowhood the yearly rent-charge of 500*l.* if and so long as J. Greaves should be living, and, after the death of J. Greaves, the yearly rent-charge of 800*l.*; and subject thereto, to the use of J. Greaves for life, with remainder to uses to secure the payment of certain annuities or rent-charges amounting to 910*l.*; with remainder to E. P. Greaves for life; with remainder to the use of Sir L. Jones and F. S. McMaster, their executors, administrators, and assigns, for the term of 2500 years to commence from the death of E. P. Greaves upon the trusts thereinafter declared; with remainder to the use of the first and every other son of E. P. Greaves successively in tail; with remainder to the use of the first and every other daughter of E. P. Greaves successively in tail; with remainders over. And it was thereby declared that the said premises were limited to the said Sir L. Jones and F. S. McMaster for the said term of 2500 years upon trust that the said trustees or the survivor of them, or the executors or administrators of such

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survivor, their or his assigns, should by mortgage or sale of the settled estates, or out of the rents and profits thereof, raise and pay the sums following for the portion or portions of the children of E. P. Greaves (other than any son or daughter who should become indefeasibly entitled under the settlement to the first estate in tail), that was to say: "If there shall be one such child only other than as aforesaid, the sum of six thousand pounds to be paid, if a son upon his attaining the age of twenty-one years, and if a daughter upon her attaining the age of twenty-one years or being married, which shall first happen. And if there shall be more than one such child other than as aforesaid, the sum of ten thousand pounds to be equally divided between or among all and every such children, share and share alike, sons at their respective ages of twenty-one years, and daughters at their respective ages of twenty-one years or marriage, which shall first happen. Provided that if such time or respective times of payment to such child or children shall happen in the lifetime of the said E. P. Greaves, then and in such case the portion or portions of him, her, or them respectively who shall attain the age of twenty-one years or be married, as the case may be, in the lifetime of the said E. P. Greaves, shall become a vested interest in him, her, or them respectively, and be transmissible to his, her, or their executors, administrators, and assigns, and shall be paid immediately after the decease of the said E. P. Greaves. And if any such son or sons, other than a son or sons becoming entitled for the first estate in tail as aforesaid, shall die under the age of twenty-one years leaving issue of his or their respective body or respective bodies living at the time or respective times of his or their decease, then the portion or portions of him or them so dying shall go and be paid to such issue respectively (such issue respectively taking the portion of his or their deceased parents only) as soon after the decease of the said E. P. Greaves as such issue can respectively give a legal discharge for the same." And the trustees were thereby appointed trustees for all the purposes of the Settled Land Acts, and for all the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881. The settlement, however, con-

tained no provision for the maintenance during minority of children who might be contingently entitled to portions.

E. P. Greaves survived his father J. Greaves, and died in 1897 leaving three children and no more, all of whom were infants; and the eldest of whom (a son aged twelve years) was tenant in tail under the settlement. The widow of E. P. Greaves was in receipt of her annuity of 800*l.* per annum, and the trustees under their statutory powers were making her an allowance of 300*l.* per annum for the maintenance and education of the infant tenant in tail. The net income of the settled estates, after providing for all annuities and charges (including the said allowance of 300*l.* per annum), exceeded 1400*l.* per annum.

The question now raised was whether the trustees had power to make any and what allowance out of the net income for the maintenance and education of the two younger children during their respective minorities.

Clarkson, for the trustees and the widow. It is submitted that, where a settlement is made by a father or other person standing in loco parentis, interest will be allowed on the portions by way of maintenance, although the interest of the children are contingent on twenty-one or marriage: Lewin on Trusts, 10 ed. p. 472; *Warr* v. *Warr*. (1)

Gaddum, for the infant tenant in tail. In *Butler* v. *Duncomb* (2) it was held that a portion, though vested, did not carry interest before the time for payment.

[FARWELL J. In that case the term had not commenced to run. Here it has. That seems the distinction between the two cases.]

In *Beal* v. *Beal* (3) portions were not payable until twenty-one or marriage, and it was held that interest was not payable in the meantime, and that the jointress ought to maintain the children out of her rent-charge. Here the widow has a jointure which is now increased to 800*l.* per annum, and it is submitted that she ought to maintain the two younger children.

(1) (1702) Pr. Ch. 213. (2) (1718) 1 P. Wms. 448.
(3) (1715) Pr. Ch. 405.

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Clarkson, in reply. *Beal* v. *Beal* (1) was a settlement by brothers. The observations of Lord Hardwicke in *Green* v. *Belchier* (2) support the view that interest should be allowed.

Heckscher, for the two younger children.

FARWELL J. Without expressing any opinion as to whether the children on the true construction of this settlement take vested interests or not, I will deal with the case as a question of principle. I think the general rule stated in Lewin on Trusts, 10th ed. p. 472, is accurate. He says: "It will be collected from the preceding cases that portions provided for children have this peculiar quality, that whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions—that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that on the other hand portions are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children." I think that proposition is sound, and I adopt it. I think the younger children here are entitled to a reasonable rate of interest on their portions by way of maintenance during their respective minorities. The amount to be allowed is in the discretion of the Court. Under the circumstances, I think the allowance should be at the rate of 3 per cent. on the portions—that is, 300*l.* per annum until further order.

Solicitors for all parties: *Cunliffe & Greg, Manchester.*

(1) Pr. Ch. 405. (2) (1737) 1 Atk. 505.

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July 6, 12.

[1900 L. 1351.]

Settled Estates—Tenant for Life—Alienation of Life Estate—Powers of Leasing —Lease of Minerals—Rents varying with Selling Price of Minerals gotten —Statutory Powers—Validity of Leases—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 2, 9, 11, 56—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 8.

When a person has under several instruments a power of appointment over the same subject-matter, and makes an appointment in exercise of "every power" enabling him in that behalf, the power first in point of time is exercised; and if effectually exercised there remains no subject-matter on which the other powers can operate. The Court may also consider which power is most beneficial to the donee of the power.

By a settlement made in 1876 estates were limited, in the events which happened, to A. for life, remainder to B. for life, with remainders over. The settlement contained a power for every person "as and when he should be entitled to the possession or the receipt of the rents and profits" of the settled estates, to grant mining leases reserving the best rents or royalties "by the acre, ton, or otherwise" without taking any fine or premium. During A.'s life B. absolutely aliened his reversionary life interest for value. A. died in 1882. Between the coming into operation of the Settled Land Act, 1882, and of the Settled Land Act, 1890, and after the later Act, B. granted mining leases reserving rents varying with the selling price of the minerals gotten, which was in accordance with the custom of the county. All the leases were granted in exercise of "every power" enabling B. in that behalf. Questions having arisen as to the validity of the leases, and whether they were granted under the power in the settlement or under the power in the Settled Land Acts:—

Held, (1.) that it was competent for B. to exercise the power of leasing in the settlement notwithstanding that he has aliened his life estate; and (2.) that the reservation of rents varying with the selling price of the minerals was within the power and valid:

Held, also, that the leases were granted under the power in the settlement, which was first in point of date, and not under the power in the Settled Land Acts:

Held, further, that, assuming the leases were granted under the Settled Land Acts, the "conflict" referred to in s. 56 of the Act of 1882 means a conflict between provisions connected with the execution of the power—e.g., the consent of a third party—and not with the result or subject-matter of the power.

THIS was an originating summons to obtain the decision of the Court as to whether certain leases of minerals were valid,

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and whether there existed under any and which of them an obligation to set apart as capital one-fourth of the royalties reserved, under these circumstances.

Henry, Earl of Lonsdale, died on August 15, 1876, having by his will dated February 6, 1876, and proved on September 18, 1876, devised all his estates in Westmoreland, Cumberland, and elsewhere (subject to a jointure and to certain portions charged thereon) to the use of his eldest son St. George Henry, Viscount Lowther, and his assigns for his life without impeachment of waste, with remainder to the use of his first and other sons severally and successively in tail male, with remainder to the use of the testator's second son Hugh Cecil Lowther (the plaintiff) and his assigns for his life without impeachment of waste, with remainders over.

The will contained the following power of leasing:—

"Provided always and I hereby declare that it shall be lawful for every person hereby made tenant for life of the said manors and hereditaments hereinafter devised in strict settlement as and when he shall be entitled to the possession or the receipt of the rents and profits of the same manors and hereditaments . . . . by deed to appoint by way of lease all or any of the . . . . minerals in, under, or upon the same premises . . . . for any term of years not exceeding sixty years . . . . so as there be reserved on every such appointment the best rents, tolls, duties, royalties or reservations by the acre, ton, or otherwise that can be reasonably gotten without taking anything in the nature of a fine or premium. . . . . Provided always that the reservation of rents, tolls, duties or royalties the amount of which shall vary with or according to the acreage worked or the minerals . . . . gotten, shall not be taken to be in the nature of a fine or premium though the effect of such reservation may eventually be disadvantageous to the remainderman."

By a deed dated May 18, 1881, the plaintiff, for valuable consideration, assigned unto St. George Henry (then the Earl of Lonsdale and tenant for life in possession under the settlement) his reversionary life interest in all the settled estates, to hold unto and to the use of St. George Henry, Earl of Lonsdale,

his executors, administrators and assigns, for his and their absolute use and benefit during the life of the plaintiff. This deed contained a proviso that the powers of leasing given by the will should, notwithstanding the plaintiff's execution of the deed, be exercisable by him with the consent of St. George Henry, Earl of Lonsdale, his executors, administrators or assigns.

By a deed dated May 24, 1881, St. George Henry, Earl of Lonsdale, assigned to trustees the estates comprised in and assured by the deed of May 18, 1881, to hold to them, their executors, administrators and assigns, for the life of the plaintiff, upon trusts for management and for the benefit of the earldom. This deed conferred on the trustees very wide discretionary powers as to the disposal of the income that should come to their hands.

St. George Henry, Earl of Lonsdale, died in February, 1882, without issue male, and thereupon the plaintiff became Earl of Lonsdale and tenant for life entitled to possession of the settled estates.

After the death of St. George Henry, Earl of Lonsdale, the plaintiff granted sundry leases of the minerals (coal and ironstone) under the settled estates in Cumberland, reserving royalties varying according to the selling price of the minerals gotten. All these leases purported to be granted by the plaintiff "by virtue and in exercise of every power or authority in anywise enabling him in this behalf," and were granted with the consent of the defendant James Lowther, who was the surviving trustee of the will and of the deed of May 24, 1881. Some of the leases were granted before the Settled Land Act, 1882, came into operation; some after that date and before the Settled Land Act, 1890, came into operation; and some after the last-mentioned Act. Questions having arisen as to the validity of the leases, and also as to whether ss. 9, 11, and 56 of the Settled Land Act, 1882 (1), and s. 8 of the Settled Land

(1) The Settled Land Act, 1882, enacts (s. 2, sub-s. 10): "Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and in relation to rent, payment includes delivery. . . ."

Sect. 9, sub-s. 1. "In a mining lease—The rent may be made to be ascertainable by or to vary according

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Act, 1890, applied, this summons was taken out as above stated. There was evidence that it was usual in the case of leases of minerals in the county of Cumberland to reserve royalties varying according to the selling price of the minerals gotten, and that such a reservation was a fair and equitable one as between lessor and lessee.

Younger, Q.C., and *H. Charlton Hawkins*, for the defendant James Lowther.

W. F. Hamilton, Q.C., and *W. Brinton*, for the plaintiff. It is submitted that all the leases are granted under the power in the will, and are valid. In the first place, the plaintiff is the person entitled to the receipt of the rents and profits, and it is competent for him to grant leases, although he has aliened his life estate: Farwell on Powers, 2nd ed. p. 20; *Long* v. *Rankin* (1); *Alexander* v. *Mills*. (2) Secondly, a rent which

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to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land. . . ."

Sect. 11: "Under a mining lease . . . . unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

Sect. 56: "(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

The Settled Land Act, 1890, enacts (s. 8): "In a mining lease, the rent may be made to vary according to the price of the minerals or substances gotten, or any of them."

(1) (1822) Sugden on Powers, 8th ed. App. p. 895.

(2) (1870) L. R. 6 Ch. 124.

fluctuates according to the happening of certain events is not an uncertain rent: *In re Knight.* (1) Here the power authorizes the reservation of royalties by "the acre, ton, or otherwise," which point to a fluctuating rent. A royalty varying with the selling price of the minerals is, it is submitted, covered by the words "or otherwise" and within the meaning of the power, and is in accordance with the custom of the county; and by the terms of the power there is no obligation to set aside any portion of the royalties for the remaindermen. Thirdly, if the leases are not good under the power in the will, neither are they good under the statutory powers. Sect. 9 of the Settled Land Act, 1882, is exhaustive, and does not authorize a rent varying with the selling price of minerals gotten, and its provisions are not extended by the definition of "rent" in s. 2 of the Act. The leases made after the Settled Land Act, 1890, may under s. 8 of that Act be good.

[FARWELL J. What do you say to s. 56 of the Act of 1882? Does not that section import s. 11 of the Act, if there is a conflict between the settlement and the Act?]

We submit not. "Conflict" means a conflict between different persons, each claiming to exercise his own power. At any rate, the proviso in the power in the will expresses "a contrary intention" within the meaning of s. 11: *In re Duke of Newcastle's Estates.* (2) If the Acts had not been passed, the leases would have been good under the power.

Hughes, Q.C., and *MacSwinney*, for the defendant remaindermen. The leases are not authorized by the power in the will. First, because the plaintiff is not "entitled to the possession or the receipt of the rents and profits" of the settled estates. It is a question of construction. On the true construction of the power, the person entitled to the possession or the receipt of the rents and profits is the defendant Lowther, and the cases cited do not apply. Next, the power does not authorize a rent varying with the selling price of the minerals. The words "or otherwise" must be taken ejusdem generis with the preceding words, and mean a rent of the same nature varying with the quantity gotten. Lastly, the leases are made by virtue of

(1) (1882) 21 Ch. D. 442. (2) (1883) 24 Ch. D. 129.

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"every power" enabling him in that behalf. The effect of that is, that he is exercising both the power in the will and the statutory powers. That gives rise to a conflict, because s. 9 does not authorize the reservation of rents varying with the selling price. There is, therefore, a "conflict"; and then s. 56 says the statutory powers are to prevail. That brings in s. 11, which requires one-fourth of the rents to be capitalised, and there is no "contrary intention" expressed in the settlement. If it had been intended to exclude the statutory powers, the leases should have been granted in exercise of all powers "other than the powers contained in the Settled Land Acts." This is frequently done in practice. Here both the power in the will and the statutory powers are exercised. The result is that s. 56 applies; and then under s. 11 one-fourth of the rents must be capitalised. There is no "contrary intention" expressed in the will.

[FARWELL J. If the donee of powers of appointment under several instruments makes an appointment in exercise of "every power" enabling him, would he not exercise the power which was first in point of time?]

That may be so, and the Court would probably also have regard to the power most beneficial to the donee.

W. F. Hamilton, Q.C., in reply. Sect. 56 was passed expressly in the interests of a tenant for life, and the powers given by the Acts are cumulative: Hood and Challis's Settled Land Acts, 5th ed. p. 285.

Cur. adv. vult.

July 12. FARWELL J. This is a summons under the Settled Land Acts asking for a declaration that no part of the rents reserved under certain leases of the Lonsdale estates settled by the will of Henry, late Earl of Lonsdale (which rents vary with the selling price of the minerals gotten), need be set aside as capital money under the Settled Land Acts, and the answer to this depends upon whether the leases in question were granted under the Settled Land Acts or under the power in the will. These leases fall under two heads—(1.) those granted between the Settled Land Act, 1882, and that of 1890; and

(2.) those granted after the latter Act. Henry, late Earl of Lonsdale, made his will on February 6, 1876, and died August 15, 1876. He devised large estates in the north of England to uses under which there were several successive tenants for life, with remainder to the issue in tail male of each according to seniority. The last Earl of Lonsdale (St. George) was one of such tenants for life, and in May, 1881, he purchased the reversionary life interest of his brother, the present Earl, and conveyed it to trustees (of whom the defendant, Mr. James Lowther, is the sole survivor) on trusts for management and for the maintenance of the earldom. The present Earl has no legal right to call for any payment from the trustees, but it is conceded by all parties that he is tenant for life within the meaning of the Settled Land Acts. St. George, Earl of Lonsdale, died on February 8, 1882, without issue, and since then the estates have been managed by the trustees of the settlement of 1881. The will of Henry, Earl of Lonsdale, contains a power of granting leases for twenty-one years for ordinary purposes, ninety-nine years for building purposes, and sixty years for mining purposes, and in each case the donee of the power is the same. The power as to mining leases is as follows: "Provided always and I hereby declare that it shall be lawful for every person hereby made tenant for life of the said manors and hereditaments hereinbefore devised in strict settlement as and when he shall be entitled to the possession or the receipt of the rents and profits of the same manors and hereditaments . . . . to appoint by way of lease all or any of the mines, coals, stones, clay, sand, and mineral substances in, under, or upon the same premises . . . . so as there be reserved on every such appointment the best rents, tolls, duties, royalties or reservations by the acre, ton, or otherwise that can be reasonably gotten without taking anything in the nature of a fine or premium, and so as there be contained in every such appointment a condition of re-entry for non-payment or non-delivery within a reasonable time to be therein specified of the rents, tolls, duties, royalties or reservations thereby reserved, and so as the appointee or appointees do execute a counterpart thereof and do thereby covenant for the due

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payment or delivery of the rents, tolls, duties, royalties, or reservations thereby reserved. Provided always that the reservation of rents, tolls, duties, or royalties the amount of which shall vary with or according to the acreage worked or the minerals, coals, stone, clay, sand, or substances gotten shall not be taken to be in the nature of a fine or premium, though the effect of such reservation may eventually be disadvantageous to the remainderman." Many leases of the settled minerals have been granted since 1883, and they have all been granted by the present Earl with the consent of the trustees or trustee of the settlement of 1881, and are expressed to be made in exercise of every power or authority enabling him in that behalf. The defendants contend that these leases cannot have been granted under the power in the will, but that, if they can be supported at all, they must take effect under the Settled Land Acts. It is said, first, that the power of leasing in the will is no longer exercisable. It is not contended that the power has been extinguished by the alienation of the life estate, for it is now well settled that a power appendant may be exercised by the donee thereof, although the estate to which it was appendant be gone, provided there is no derogation from the rights of the alienee of the estate; and of course there is no such derogation here, because Mr. Lowther has assented to all the leases that have been granted. But it is said that, as a matter of construction, the present Earl does not answer the description of the person to whom the power is entrusted. I am unable to adopt this view. A power of leasing is one of those powers of management which are inserted in settlements for the benefit of the settled estate generally. Its exercise is fenced about with provisions for the safety of the remaindermen, and, as was pointed out in *Alexander* v. *Mills* (1), there is no presumption that a testator would prefer that the estates should remain unleased or unsold rather than that a tenant for life, possibly the testator's son or grandson, should make or assent to the making of leases and sales after he had parted with his life estate. I do not forget that I am dealing with a mineral lease

(1) L. R. 6 Ch. 124.

in which the tenant for life consumes a part of the inheritance, but the other powers of leasing, and the similar powers of granting licences to copyholders and of consenting to sales and enfranchisements and partitions are expressed in similar terms. In my opinion the words "as and when he shall be entitled to the possession or the receipt of the rents and profits, &c.," applied as in this will to a number of persons taking in succession, refer to the falling into possession of the several life interests, and not to the actual unincumbered beneficial enjoyment thereof. The words may be paraphrased "as and when his life estate shall be in possession." Authority is of little assistance in construction cases, but *Long* v. *Rankin* (1) is a strong authority on a similar provision. The next objection is this—the leases reserve a rent varying with the selling price of the minerals, in accordance with the custom of the county. It is said that this is not authorized by the power, and that the leases for this reason cannot have been granted under the power. Now, the power clearly authorizes the reservation of a rent in kind. Such a reservation necessarily involves a variation in value, for it is practically certain that the value of the minerals will vary in a term of sixty years, and it would, in my opinion, be absurd to hold that the tenant for life could reserve a varying rent if he reserved it in kind, but could not do so if he reserved it according to the selling price, although the result would be exactly the same except for the additional convenience to the lessors of the latter method. It is contended that the proviso at the end of the power is limited so as to exclude the case of such a varying rent, but this proviso is inserted to meet the cases where a varying rent is not necessarily implied in the exercise of the power. I cannot infer, from the absence of an unnecessary express intention to include such leases, an intention to exclude them, and therefore to abrogate the power of leasing at varying rents already expressly given. I hold, therefore, that the power in the will authorized the grant by the Earl, with the consent of Mr. Lowther, of the leases in question.

But then it is said that they might equally have been granted

(1) Sugden on Powers, 8th ed. App. p. 895.

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under the Settled Land Act, 1882, and it is admitted that such of them as are made after 1890 could have been granted under that Act and the Act of 1890; and it is said that I ought to hold that the requirement of s. 11 of the Act of 1882 is imposed by s. 56 of the same Act on all the leases. It was argued, on the other hand, that the leases granted before 1890 could not have been granted under the Act of 1882 alone, because it is said that rents varying according to the price of minerals were not authorized by that Act. In the view that I take it is not necessary for me to determine this. I assume for the purposes of my judgment that such leases could have been granted, and I draw no distinction, therefore, between leases granted before and leases granted after the Act of 1890 came into operation. Under the will the tenant for life is entitled to the whole of the rents, &c., arising from leases of the minerals. Sect. 11 provides: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." If, therefore, s. 56 has the effect for which the defendants contend, it will deprive a tenant for life of a part of his income without compensation. Now, it is a sound rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: see per Lord Esher in *Attorney-General* v. *Horner*. (1) Am I so obliged? The 1st sub-section of s. 56 merely preserves powers under settlements; the 2nd sub-section causes the difficulty. It says: "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the

(1) (1884) 14 Q. B. D. 245, 257.

settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act." I think that the provisions here referred to are provisions connected with the execution of the power—e.g., consent of a third person—not with the results of such execution; they deal with the act of execution, not with the proceeds thereof, and this is borne out by the sentence "and accordingly," &c., which shews the purview and scope of the sub-section and limits its generality. I therefore hold that s. 56 does not override the provisions of the will in this respect.

But then it is said that the leases are granted in execution of all powers and authorities, and are therefore granted under the power in the Act. Now, it is common practice for a man to purport to execute all powers. He does so in order to avoid the risk of his appointment being defeated by the failure of the particular power primarily applicable, while he has another which would, if exercised, supply the defect. In the same way, it used to be common practice to find that a man both appointed and granted in order that if either the appointment or grant failed the other might supply the deficiency. But in both those cases the property can in fact pass once only, and it must so pass by means of the first effective available legal means. If a man has once effectually appointed the property he cannot afterwards grant the same property, either by the same or any subsequent deed, because there is nothing on which the grant can operate. So, if he has effectively appointed under a power created by one instrument, he cannot again appoint the same property under a power created by another instrument, because there is no subject-matter on which the latter power can operate. The mere fact, therefore, that he purports to execute all powers does not prove that he has executed the statutory power, but I have to ascertain which he has in fact executed. The only suggestions made by counsel were that the power earlier in point of time should be taken to be executed rather than the later, and that the power more favourable to the donee of the power should be presumed to be executed rather than

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that which would deprive him of income. In the present case both these presumptions coincide, and nothing is suggested against them. I therefore hold that the power in the will, and that only, has been executed, and I answer the question in the summons by saying that no part of the mineral rents need be set aside.

Solicitors for all parties: *Ellis & Ellis.*

H. L. F.

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TOWNSEND *v.* JARMAN.

[1899 T. 1459.]

Goodwill—Partnership—Partner's Covenant—Restriction against Trading—Assignment of Goodwill—Benefit of Covenant—Firm Name—No express Assignment—Vendor and Purchaser—Conveyance of Freehold Shop—Vendor's Name over Door—Vendor's Right to Erasure.

The benefit of a partner's covenant not to carry on a similar business to that of the partnership during a fixed period from the commencement thereof passes by an assignment of the goodwill of the partnership.

Jacoby v. *Whitmore*, (1883) 49 L. T. 335, applied.

Unless the right to use the firm name is expressly assigned, the assignee of the goodwill must not use the name so as to expose any partner to liability.

Semble, if the firm name merely consists of the surname of a partner with the addition of the words "& Co.," and the partner has not used the firm name as his own except in connection with the firm, there is no appreciable risk that its user will expose him to liability.

Burchell v. *Wilde*, [1900] 1 Ch. 551, applied.

A purchaser bought a freehold shop with the vendor's name carved thereon, but did not use the name in his business:—

Held, that the vendor could not compel him to erase it.

WITNESS ACTION.

For some years prior to June 30, 1888, the defendant had carried on business as a seed, corn, and manure merchant and nurseryman at Chard, under the style of "E. J. Jarman," which name was carved in stone over the door of his freehold shop at Chard.

On June 30, 1888, the defendant took the plaintiff into partnership in the said business.

The partnership articles, dated June 30, 1888, provided:

(art. 1) that the partnership should commence on July 1, 1888, and continue for the term of twenty-one years unless the same should be previously determined under the provisions hereinafter contained; (art. 2) that the firm and style of the partnership should be "Jarman & Company, the People's Seedsmen"; (art. 25) that either partner might retire from the firm at the end of the seventh or fourteenth year of the partnership term upon giving to the other partner twelve calendar months' notice in writing, and in such case the other partner should be at liberty to purchase the share of the retiring partner upon giving to him a notice in writing to that effect at any time before the determination of the partnership by reason of the first-mentioned notice; provided always that the plaintiff, whether he should have withdrawn from the partnership by notice as aforesaid, or the same should have determined by effluxion of time, or by death, or in any other manner, should not during the period of twenty-one years from the commencement of the partnership (unless he should purchase the share of the defendant under art. 28) carry on the business of a corn, seed, and manure merchant or nurseryman within a distance of forty miles from Chard; and (art. 28) that if either of the partners should die before the expiration or determination of the partnership as aforesaid, the surviving partner should have the option of purchasing his share of the business and goodwill at a valuation to be made as therein mentioned.

The business was principally carried on by the firm at the Chard shop, which they held as tenants to the defendant.

On January 2, 1895, a company was incorporated under the name of "Jarman & Co., Limited," with the object of purchasing and carrying on the partnership business.

On May 25, 1895, the plaintiff and defendant sold and assigned all the beneficial interest and goodwill of the plaintiff and defendant in the said business, and conveyed certain nurseries and premises to the company. The defendant at the same time sold and conveyed the Chard shop to the company, the name "E. J. Jarman" still remaining thereon. The plaintiff and defendant were the managing directors of the company, and the defendant was also the chairman.

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In 1899 the company was wound up voluntarily, and the Chard shop and the goodwill of the Chard business were sold, conveyed, and assigned to the plaintiff.

There was no special assignment of the trade name either in 1895 or in 1899.

The plaintiff was now carrying on the Chard business at the Chard shop under the style of "Jarman & Co."

The defendant had opened a similar business at Chard, which he carried on first under the style of "Jarman & Co.," and afterwards of "Jarman & Jarman." The plaintiff alleged that the defendant, by the use of the above styles at Chard and in other ways, had held himself out as carrying on business at Chard in continuation of or in succession to the original Chard business. The plaintiff claimed an injunction to restrain the defendant from so doing. The defendant denied this allegation, and, submitting that having regard to art. 25 the plaintiff had no cause of action, he counter-claimed for an injunction to restrain the plaintiff from carrying on the said business at Chard in breach of art. 25, and also for an injunction to restrain him from carrying on business as "Jarman & Co.," or with the name "E. J. Jarman" carved on his shop, so as to subject the defendant to the risk of liability for the plaintiff's debts.

The name had now been erased, so that the last point only went to costs.

The Court held on the evidence that the holding out had been proved.

Younger, Q.C., and *Buckmaster*, for the plaintiff. The defendant must not carry on business at Chard as "Jarman & Co.," or "Jarman & Jarman," or under any style likely to be confused with the plaintiff's style of "Jarman & Co." There is no objection to his trading as "E. J. Jarman," but the assignment of the Chard goodwill to the plaintiff carried the exclusive right to the old name in that locality, and the plaintiff is entitled to use it so long as it does not involve the defendant in any liability: *Massam* v. *Thorley's Cattle Food Co.* (1); *Turton*

(1) (1880) 14 Ch. D. 748.

v. *Turton* (1); *Trego* v. *Hunt* (2); *In re David and Matthews* (3); *Burchell* v. *Wilde*. (4) The plaintiff's use of the style "Jarman & Co." will not involve the defendant in any liability.

The benefit of the plaintiff's covenant in art. 25 was an asset of the partnership business, and passed to the company, and from them to the plaintiff as part of the goodwill: *Jacoby* v. *Whitmore*. (5) The defendant, therefore, cannot enforce it. The carved name "E. J. Jarman" passed to the company, and from them to the plaintiff as part of the freehold; and, as the plaintiff has never used that name in his business, the defendant was not entitled to have it erased, though the plaintiff has in fact erased it. The counter-claim should be dismissed with costs.

Hughes, *Q.C.*, and *Kerly*, for the defendant. Art. 25 was not a covenant by a third person with the firm, the benefit of which, as in *Jacoby* v. *Whitmore* (5), would pass by an assignment of the goodwill. It was merely a personal covenant between the partners, and in no sense an asset of the business. The defendant is still entitled to enforce it, and the plaintiff has, therefore, no right of action.

[FARWELL J. There cannot be a covenant in gross in restraint of trade: *Horner* v. *Graves*. (6)]

This covenant was not originally a covenant in gross. It was a covenant for the protection of the defendant's business, and, being valid in its inception, it continues valid even after the defendant has parted with the business: *Elves* v. *Crofts*. (7) The plaintiff's use of the style "Jarman & Co." will involve the defendant in liability, and to that extent the defendant is entitled to an injunction: *Thynne* v. *Shove*. (8) The plaintiff had in any case no right to retain the name "E. J. Jarman" carved on his shop, and the defendant ought to have the costs of the counter-claim on that point.

Buckmaster, in reply.

(1) (1889) 42 Ch. D. 128.
(2) [1896] A. C. 7.
(3) [1899] 1 Ch. 378.
(4) [1900] 1 Ch. 551.
(5) 49 L. T. 335.
(6) (1831) 7 Bing. 735, 743; 33 R. R. 635.
(7) (1850) 10 C. B. 241, 259.
(8) (1890) 45 Ch. D. 577.

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FARWELL J., after holding on the evidence that the holding out was proved and that, subject to the counter-claim, the plaintiff was entitled to an injunction, continued :—The counter-claim raises an ingenious and novel suggestion which goes to the root of the whole claim. Art. 25 of the partnership articles provided that the plaintiff, whether he should have withdrawn from the partnership by notice, or the same should have been determined by effluxion of time, or by death, or in any other manner, should not during the period of twenty-one years from the commencement of the partnership (unless he should purchase the share of the defendant under art. 28) carry on the business of a corn, seed, or manure merchant or nurseryman within a distance of forty miles from Chard; and art. 28 provided that if either of the partners should die before the expiration or determination of the partnership the surviving partner should have the option of purchasing his share of the business and goodwill at a valuation. The defendant seeks to enforce the covenant in art. 25, contending that the benefit of that covenant did not pass to the company on their purchase of the partnership business, as it was merely a covenant between the partners, and not a portion of the partnership business. But that contention, to my mind, is fallacious. The company bought the business and goodwill of the two persons conveying, namely, the plaintiff and defendant; the defendant owned a larger share of this than the plaintiff, because the business, regarded as a continuing business with the goodwill attached to it, was worth more to the defendant by reason of the plaintiff's covenant in art. 25. But a covenant of that nature when originally entered into must necessarily be incident to a business. In other words, there cannot be a covenant in gross in restraint of trade; for such a covenant would be unreasonable, and therefore void. I cannot state a better test of reasonableness than that given by Tindal C.J. in *Horner* v. *Graves*. (1) He says: "But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection

(1) 7 Bing. 735, 743; 33 R. R. 635.

to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." Now, if one man, apart from any business, takes a covenant in gross from another man that he will not trade at all, that is simply oppressive. He does not require it to protect his own interest, because he has no interest to protect. It is therefore only as incident to the business that the covenant can in its origin have legal validity, although, as was held in *Elves* v. *Crofts* (1), it may very well continue to have validity after the original business has ceased, because ex post facto occurrences do not necessarily invalidate a covenant good in its inception. The defendant, therefore, cannot successfully assert that this was a covenant in gross not incident to the business. Moreover, it plainly increased the value of the business in the hands of an assignee, and the defendant in terms assigned the whole of the goodwill to the company. The defendant, therefore, is in this dilemma: if it is a covenant in gross, it is void; if it is not, the benefit of it is not vested in him, but in his assignees. Test it in this way. Suppose the plaintiff had gone out of the partnership so that the defendant was entitled to enforce the covenant against him, and the defendant had then sold the goodwill to the company, could it have been contended that the company had not got the benefit of this covenant? The point would have been hopelessly unarguable. The benefit of the covenant, therefore, passed as incident to the goodwill, not only for the reason I have suggested, but also for the reason given in the case of *Jacoby* v. *Whitmore* (2), namely, that the covenant was for the benefit of the business. As Brett M.R. said: "It has been said that such an agreement does not add to the value of the goodwill, because it does not bring fresh customers, but it prevents them from being taken away." The foundation of that decision was that the covenant added to the value of the goodwill, and the

(1) 10 C. B. 241, 259. (2) 49 L. T. 335, 337.

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inference, therefore, was irresistible that in conveying the goodwill the grantor intended to convey and the grantee to obtain the whole of the benefit and protection of everything incident or beneficial to the goodwill. There is nothing in *Elves* v. *Crofts* (1) in any way opposed to this. Wilde C.J., in delivering the judgment of the Court, says: "But it is suggested, that, as these decisions are based on the assumption that such a restriction is necessary for the entire protection of the covenantee, it must be construed as ceasing to operate in a case like that asserted by the third plea, and found by the jury, where the covenantee has ceased, by himself or his assigns, to carry on the business assigned. But we think this reasoning fallacious. If the covenant is binding to its full extent, when made, its signification cannot be varied by any subsequent occurrence: and, to hold otherwise, would be to render its import uncertain, and to impair its efficiency for that protection which the law contemplates as just. Cases may be conceived, in which, notwithstanding the facts found by the jury,—that the covenantee had ceased, either on the premises or elsewhere, or by any assignee or licensee, to carry on the trade,—the goodwill assigned might not be at once extinguished; and, if considerations of time or degree be permitted to affect the right to enforce such a covenant, its value would be diminished, and the saleable quality of goodwill,—which, according to all the recent authorities, is deserving protection,—would be affected." In *Elves* v. *Crofts* (1) it was held that the covenant was not extinguished. That case turned on a question of implied release of the covenant. It in no way touches the question of the assignment of the benefit of such a covenant as incident to the goodwill. That an assignment of the goodwill passes the benefit of such a covenant is plain from *Jacoby* v. *Whitmore*. (2) I therefore hold that the benefit of the covenant was one of the incidents of the goodwill, and that it was conveyed by the defendant to the company, and by them to the plaintiff. That disposes of the point on art. 25.

There are two other points. It was contended by the defendant that I ought not to allow the plaintiff to use the

(1) 10 C. B. 241, 259. (2) 49 L. T. 335.

style of "Jarman & Co.," and also that I ought, having regard to the facts, to order the plaintiff to pay the costs of the counter-claim in respect of the name "E. J. Jarman" on the shop. The two points are somewhat different. The Court no doubt qualifies the right which is given under an assignment of goodwill, when the actual use of the name is not specified, by limiting the user of the name to which the goodwill is annexed, so as not to impose a personal liability upon the assignors. So far, however, as the use of the name of "Jarman & Co." is concerned, I am of opinion there is no liability which can reasonably be supposed to accrue to the defendant by its user. The defendant having transferred the right to use that name to the company, knowing that the company might sell it again to somebody else, cannot complain that they have sold that which he gave them the right to sell; nor can I see that the use of the name will involve the defendant in any liability. On this point it is sufficient to refer to *Burchell* v. *Wilde*. (1) The defendant's name is not and never has been "Jarman & Co.," and a man is not held out as a partner by the use of a name which is not his own.

Then there comes the very curious question about the carved name. This is only material on the question of costs, and it raises a question which, so far as I know, is absolutely novel. When the shop used for the business of the old firm, and of the defendant before it, was built, the name "E. J. Jarman" was carved in stone over the door. Now, if the plaintiff were using the name "E. J. Jarman" as a means of trading otherwise than by allowing the carving to remain on the shop he has bought, I should certainly think that he was not entitled so to use it. No right to use that name has been assigned to him. He tells me he does not intend to use the name, and that he has erased it. The question is, whether he was bound so to erase it. It is a question of conflicting rights. The defendant sold the shop with the carving thereon to the company, who resold to the plaintiff. The

(1) [1900] 1 Ch. 551.

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carved stone formed part of the freehold. What right had the defendant afterwards to require the company, or the plaintiff, to remove a part of the freehold? I am wholly unable to see that he had any such right. If a man chooses to sell a shop with his name carved thereon, and takes no covenant from the purchaser to alter the building in that respect, I can see no equity whatever which will afterwards enable him to compel the purchaser to do so. The name here was capable of erasure without much trouble, but it might have been built in by means of coloured bricks, and in that case the defendant, if his contention is correct, would have been entitled to compel the plaintiff to pull out that portion of the building. I can only say that if the vendor of a shop desires to compel the purchaser to pull down and alter a portion of it, because the use of the shop as it stands may impose some liability upon him, he must take a covenant to that effect. In the absence of such a covenant I hold that he has no such right. The counter-claim therefore fails, and the plaintiff is entitled to an injunction.

Solicitors: *James Banks Pittman; Reed & Reed, for Reed & Co., Taunton.*

G. R. A.

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[1894 D. 734.]

LORD DE CLIFFORD *v.* MARQUIS OF LANSDOWNE.

[1894 D. 1429.]

Trustee—Breach of Trust—Executor—Devastavit—Reliance on Solicitor—Relief from Liability—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-s.* 1.

During five years' administration of a testator's estate by the Court, the executors, who knew that large sums were necessary for the payment of debts, disbursements, and other administration purposes, paid various sums from time to time to their solicitors in reliance on their statements that these sums were in each case required for those purposes, to which they were in fact in great part applied. Shortly before the close of the administration the solicitors became bankrupt, and, the total amount paid to them being substantially in excess of the amount required and applied for administration purposes, the balance was lost to the estate:—

Held, under the special circumstances, that the executors had acted honestly and reasonably, and ought fairly to be excused for making the payments in reliance on their solicitors' statements, and ought to be relieved from personal liability in respect of the balance lost.

Bacon v. *Bacon*, (1800) 5 Ves. 331; 5 R. R. 52, followed.

Observations on s. 3, sub-s. 1, of the Judicial Trustees Act, 1896.

SUMMONS.

The estate of the late Lord De Clifford was being administered in the above actions, the first being an action for the administration of his estate, and the second an action for the administration of the trusts of his marriage settlement. The present summons was an application by the plaintiff for an order that the executors might be ordered to pay into court a sum of 1545*l.* 1*s.* 11*d.* found due from them by the master's certificate of March 23, 1900.

This sum was made up of 1015*l.* 6*s.* 6*d.* standing to the executors' credit at Hoare & Co.'s bank, and a sum of 529*l.* 15*s.* 5*d.*, the unexpended balance of certain sums paid by

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the executors to their solicitors, Messrs. Ingram, Harrison & Ingram, or allowed to be received by them for the purposes of the administration, which balance was lost to the estate by the failure of that firm in November, 1899.

The executors asked to be relieved from personal liability for this loss under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896.

The facts were as follows:—

The testator died on April 6, 1894, and the above actions were commenced soon after his death on behalf of the infant plaintiff, his residuary devisee and legatee. The estate was considerable, the real property producing over 4000*l.* a year. The testator's personalty was about 7000*l.* A large amount of the personalty consisted of arrears of rents of Irish estates which took some years to get in, thereby causing great delay in the administration. The debts were about 2500*l.*, and the death duties about 600*l.*, and there were legacies and an annuity of 250*l.* bequeathed by the will, all of which were duly paid. The executors, who were also trustees of the will, had full powers of management over the real estate during the plaintiff's minority, and certain expenses were incurred in connection therewith. They employed Messrs. Ingram, Harrison & Ingram, the private solicitors of one of the executors, to act for them in the administration.

During the course of the administration the executors, who resided in Norfolk and Derbyshire respectively, from time to time paid or allowed the solicitors to receive and retain various sums for the purposes of administration, and the solicitors from time to time made large payments thereout for those purposes. Among other items the executors paid over to the solicitors a sum of 208*l.* 11*s.* 9*d.* on October 28, 1895, and a further sum of 367*l.* 1*s.* 7*d.* on February 10, 1896. The solicitors stated that these amounts, which were balances on the Irish arrears account, were required for administration purposes, and they in fact, made considerable payments after those dates.

With reference to these and other items the executors deposed as follows:—

"During the course of these proceedings we were compelled

to rely on the advice and information given us by Mr. Harrison, a member of the said firm, and in reference to each of the items mentioned, &c., we were in each case from time to time expressly informed by Mr. Harrison that the amounts so received by his firm on our behalf and retained by them were required and necessary to be so retained to be applied under the direction of the Court in satisfaction of the debts, which were and which we knew to be of considerable amount, owing by the late Lord De Clifford, and for disbursements such as estate duties and the payment of an annuity, for costs, and for the proper management of the Irish estates belonging to him. We believed the said firm to be of high standing and quite solvent, and relied upon the statements to us by Mr. Harrison that the amount in each case retained in their hands was required to be expended and was being expended as aforesaid. We were certainly not aware that in allowing the said respective sums to be so retained by the said firm under the circumstances of the case we were breaking any legal rule or duty, and in all that we have done in this matter we believed that we were only following the ordinary practice in such cases."

By the order on further consideration, dated June 24, 1899, the executors were ordered to pay the balance then due from them into court, after making deductions for disbursements and costs, the net residue to be certified, and the account to be continued. On August 10, 1899, the residue to be paid in was certified at 789*l.* 1*s.* 3*d.*, and on August 17, 1899, the executors gave the solicitors a cheque for that amount. With reference to this payment, the executors stated as follows:—

"We had an interview with the said Mr. Cartmell Harrison in August, 1899, in accordance with his written request, and Mr. Harrison then gave us explanations with regard to the state of the executorship account, and he expressly stated to us that all the moneys which the said firm had received on our behalf as executors had been expended, and that to enable the said firm to pay the balance of the money found due from the executors, and ordered to be paid into court under the order of June 24, 1899, it would be necessary for the executors to give

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them a cheque for that amount. He also informed us that, besides the sums expended by his firm on behalf of the executors, there was a considerable amount of costs due to his firm. The said Mr. Cartmell Harrison at this interview referred to various accounts before him, and spoke of figures in these accounts, which accounts we believe to have been copies of the executors' accounts already carried into chambers and passed in this action. Upon the statement so made to us by Mr. Harrison, and at his request, we signed a cheque for 789*l.* 1*s.* 3*d.*"

This cheque was drawn on the executors' account at Hoare & Co.'s bank in favour of the firm, and the amount was duly paid into court on August 17, 1899. This was the last receipt and payment by the firm. Further sums were subsequently received by the executors, and on March 23, 1900, the balance due from them was certified at 1545*l.* 1*s.* 11*d.*

At the time the cheque for 789*l.* 1*s.* 3*d.* was paid the firm had in fact a balance of 529*l.* 15*s.* 5*d.* in hand.

The books of the firm shewed that, including the 208*l.* 11*s.* 9*d.*, 367*l.* 1*s.* 7*d.*, and 789*l.* 1*s.* 3*d*, they had received 6117*l.* 17*s.* 1*d.* from or on account of the executors, and including the 789*l.* 1*s.* 3*d.* paid into court, had paid 5685*l.* 10*s.* 10*d.*, leaving a balance of 432*l.* 6*s.* 3*d.* due from them. They had, however, charged 614*l.* 6*s.* 7*d.* for costs, of which 76*l.* 11*s.* 1*d.* was taxed off on taxation, and they had omitted to credit the executors with 21*l.* 8*s.* received, and had underdebited them with 9*s.* 11*d.* These amounts of 432*l.* 6*s.* 3*d.*, 76*l.* 11*s.* 1*d.*, and 21*l.* 8*s.*, less the 9*s.* 11*d.*, made up the balance of 529*l.* 15*s.* 5*d.* really due. As the firm was only able to pay a small dividend, this balance, as well as a substantial sum due to one of the executors on his private account, was practically lost. The executors submitted that, in paying these sums or allowing them to be so received, they had acted honestly and reasonably, and ought fairly to be excused and relieved from personal liability under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896. (1)

(1) The Judicial Trustees Act, 1896, provides as follows:—Sect. 1, sub-s. 2: "The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a

The accounts were long and complicated, but it was admitted at the hearing that the point really turned on the question whether the payments of the three sums of 208*l.* 11*s.* 9*d.*, 367*l.* 1*s.* 7*d.*, and 789*l.* 1*s.* 3*d.* were reasonable under the circumstances.

Ingle Joyce, for the plaintiff. The sum of 1545*l.* 1*s.* 11*d.* has been found due by the master's certificate; but on this summons the executors are to be treated as having applied for relief in respect of the 529*l.* 15*s.* 5*d.*, the balance in the hands of their solicitors.

The onus is on the executors.

Vaughan Hawkins, for the executors. Assuming that the executors are liable for the full amount, this is a proper case for relief under the statute. The various payments to their solicitors were all made on express statements by them that the amounts were required for administration purposes. The executors had full confidence in their solicitors, as is shewn by the fact that one executor employed them as his own solicitors. They knew that there were heavy outgoings, and were entitled to rely on their solicitors' statements as to the amounts required to meet them from time to time, and to assume that the account was being properly kept. If the Irish balances of 208*l.* 11*s.* 9*d.* and 367*l.* 1*s.* 7*d.* are deducted, the balance would in fact be in the solicitors' favour, and under the circumstances the payment of these balances in the course of the administration was reasonable. No doubt it would have been better to take the account before paying the 789*l.* 1*s.* 3*d.* in August, 1899; but the money had to be paid into court, and the account could not well be taken till after the Vacation. Under the

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trustee, within the meaning of this Act."

Sect. 3, sub-s. 1: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

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circumstances the executors were justified in relying on the express statement of their solicitors that the funds already paid to them had been exhausted: *Bacon* v. *Bacon* (1); *Speight* v. *Gaunt*. (2) In *In re Stuart* (3) the trustee acted without competent advice.

[FARWELL J. referred to *In re Kay*. (4)]

In that case the executors had notice of a large claim against the estate.

Ingle Joyce, for the plaintiff. This is not a claim for a breach of trust, but merely for a common account. The Judicial Trustees Act, 1896, is therefore inapplicable. If it applies, the plaintiff submits that the executors were unreasonable in paying these large sums to their solicitors without examining their account.

Vaughan Hawkins, in reply. The Act applies to an action for a common account, and relief for a devastavit can be given: *In re Kay*. (4)

FARWELL J. The question in this case is one of great difficulty. The Legislature has given the Court a dispensing power under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896, in cases where a breach of trust has been established; that is to say, the Court, having found that a breach of trust has been committed, can relieve the trustee from personal liability if he "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust." Now relief against the stringent rules of the common law in cases of forfeiture and the like was an old head of equity, which was applied on a thoroughly intelligible principle. The forfeiture being intended to secure the payment of money or the performance of a contract, equity gave no relief unless it could secure the payment of the money or the performance of the contract in favour of the person entitled to enforce the forfeiture, and it granted relief on the ground that it thereby gave effect to the real contract between the parties. No such principle is

(1) 5 Ves. 331; 5 R. R. 52.
(2) (1883) 22 Ch. D. 727, 743; 9 App. Cas. 1.
(3) [1897] 2 Ch. 583, 591.
(4) [1897] 2 Ch. 518.

applicable to the present case, in which equity is called upon to give relief against its own decree. The Courts of equity have established certain rules imposing liability on a trustee, although honest, and the Legislature has now given the same Courts power to grant relief against the consequences of a breach of those rules. There is nothing analogous in this to the principle underlying the relief against forfeiture at common law, and there is in fact no principle which can serve as a guide. I have merely to find as a fact that the trustee has acted honestly and reasonably, and ought fairly to be excused; and then I have power to grant relief. It is obvious that the exercise of such a jurisdiction is beset with great difficulty and requires great caution. I must bear in mind on the one hand that this relief is granted at the expense of the cestui que trust, and on the other that the trustee assumes an onerous post without reward, and the real difficulty is to say what is fair and right as between the beneficiary who entrusts his money to the trustee and the trustee who acts gratuitously on his behalf. In the present case the estate was being administered by the Court, and the executors, who resided in Norfolk and Derbyshire respectively, were practically bound to employ solicitors and to repose a considerable amount of confidence in them for the purpose of the administration. They employed Messrs. Ingram, Harrison & Ingram, a firm of high repute, and placed full confidence in them. One of the executors, in fact, employed the firm as his own solicitors, trusted his money to them, and lost largely by their failure. From time to time large sums were received by the firm from or on behalf of the executors, and duly applied by them in payment of debts, duties, and other proper disbursements. In the result, however, a balance of 529*l.* 15*s.* 5*d.* remained in their hands at the time of their failure, and the question is whether the executors ought to have relief in respect of this balance. An examination of the firm's account shews that the point depends on the following questions: (1.) Were the executors justified in paying over the Irish balances of 208*l.* 11*s.* 9*d.* and 367*l.* 1*s.* 7*d.* on October 28, 1895, and February 10, 1896, respectively? (2.) Were they justified in paying over the sum of 789*l.* 1*s.* 3*d.* on August 17, 1899?

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Now, as to the first point, it appears that the executors had entrusted the firm with large sums of money down to October 28, 1895, but the firm had largely discharged themselves down to that date by payments on account of the estate. On October 28, 1895, and February 10, 1896, the firm obtained the respective balances of 208*l.* 11*s.* 9*d.* and 367*l.* 1*s.* 7*d.* from the executors, Mr. Harrison in each case stating that the amount was required for administration purposes. [His Lordship read the executors' affidavit on this point.] Now, in making his certificate, the master has charged the executors with 1545*l.* 1*s.* 11*d.*, the balance really due from them, which includes the sum of 529*l.* 15*s.* 5*d.*, the unapplied balance of their payments to the firm. I cannot, however, say that the executors acted unreasonably in acting on the statement of Mr. Harrison that the sum of 208*l.* 11*s.* 9*d.* was required by the firm for administration purposes on October 28, 1895, and it would be harsh not to apply the same principle to the sum of 367*l.* 1*s.* 7*d.* paid to the firm on February 10, 1896, on the faith of a similar statement. The executors knew that the administration action was going on, and they were told and truly told that the amounts were required for disbursements, which they knew to be heavy, and considerable payments were in fact made by the firm after receiving those sums. There was also a large amount due to the firm for costs, originally charged at 614*l.* 6*s.* 7*d.*, but reduced by a sum of 76*l.* 11*s.* 1*d.* on taxation; and if neither of the Irish balances had been paid over there would have been a balance due to the firm on their final account. Under the circumstances, and having regard to the magnitude of the estate, I cannot see that the executors were guilty of unreasonable or foolish conduct in handing over these amounts to the firm on the statement that they were required for purposes of administration, and when in fact part thereof was so applied. I felt a little doubt at first whether the executors should have paid such large amounts to the firm without going into the accounts; but having regard to *Bacon* v. *Bacon* (1) I think that they were justified in relying on their solicitors' statement as to the amount required.

(1) 5 Ves. 331; 5 R. R. 52.

On the second point, namely, the payment of the 789*l.* 1*s.* 3*d.* in August, 1899, I have again to consider the question of reasonableness. Mr. Harrison produced the accounts, and stated that the whole amount received by his firm had been worked off. Were the trustees entitled to believe him, or were they bound to examine the accounts for themselves before making the payment? They would probably have been unable to understand them. Were they bound to postpone the payment until the accounts had been examined by an accountant? Under the circumstances I think not. It must be borne in mind that the firm were not asking for the money for general purposes, but for the payment of a definite sum into court under an order to that effect, and the sum was in fact paid into court: no part of this sum has been lost, but if the account had then been taken, the deficiency of the 529*l.* 15*s.* 5*d.* would have been discovered. The Long Vacation was just beginning, so that there might have been some delay in getting out the account. I do not think it would have been a reasonable course for the executors to have adopted in the case of a firm who had successfully acted for them in the administration action for the previous five years.

In *Bacon* v. *Bacon* (1) Lord Loughborough held that an executor was not liable for accepting a statement of the testator's solicitor that the funds already placed in his hands for payment of debts were exhausted, and remitting a further amount stated by the solicitor to be required for that purpose.

In many cases a man is justified in acting on the statement of another. For example, a mortgagee who parts with his deeds on the statement that the mortgagor wants them for a particular purpose, and tries to get them back with reasonable celerity, does not lose his priority, although the mortgagor makes use of the deeds to conceal the existence of the mortgage.

Doing the best I can under the circumstances, I have come to the conclusion that the executors have acted honestly and reasonably, and ought fairly to be excused and relieved from personal liability in respect of the balance lost.

(1) 5 Ves. 331; 5 R. R. 52.

FARWELL J.

1900

LORD DE CLIFFORD'S ESTATE, *In re.*

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I wish to guard myself against a possible misconception. I do not think the fact that one of the executors trusted the firm with his own money, and lost it, is material except as to bona fides. I am not prepared to say that a trustee has acted honestly and reasonably and ought fairly to be excused as a trustee merely on the ground that he has acted in exactly the same way with respect to his own money. The fact that he has acted with equal foolishness in both cases will not justify relief under this statute.

The plaintiff contended that the statute was confined to cases of breach of trust, and did not apply to an action for a common account like the present. But that contention is disposed of by s. 1, sub-s. 2, and by the decision in *In re Kay*. (1)

I therefore grant the executors relief in respect of the 529*l*. 15*s*. 5*d*., and order them to pay 1015*l*. 6*s*. 6*d*. into court instead of the full balance of 1545*l*. 1*s*. 11*d*. found by the master's certificate.

Solicitors: *Wing & Eade; Cheston & Sons.*

(1) [1897] 2 Ch. 518.

G. R. A.

ASSETS DEVELOPMENT COMPANY, LIMITED *v.* CLOSE BROTHERS & CO.

BUCKLEY J.

1900

July 9, 10, 11, 12, 13, 16, 17, 18, 19, 27.

[1899 A. 852.]

Practice—Costs—Higher Scale—Allegations of Fraud—Rules of Supreme Court, 1883, *Order* LXV., *r.* 9.

An allegation of fraud is not in itself a special ground, within the Rules of the Supreme Court, 1883, Order LXV., r. 9, sufficient to enable the Court to order costs to be paid on the higher scale, although the action be one which involves a great deal of investigation and a lengthy trial.

THIS was an action to set aside or vary, on the ground of misrepresentation and suppression of material facts, duress, and fraud, an agreement made between the plaintiffs and Close Brothers & Co. The agreement related to concessions obtained from the Legislatures of the Dominion of Canada, the Province of British Columbia, and the United States of America, for the construction of a railway from Skagway to the Yukon river. The statement of claim alleged that Close Brothers & Co. and other defendants had conceived a scheme of getting the benefit of the plaintiffs' concessions into their own hands and reducing the amounts of the benefits which the plaintiffs should get therefrom, and that with that object the defendants made false representations to the plaintiffs, and fraudulently concealed from them certain facts.

The trial of the action occupied nine days, of which more than eight days were taken up by the opening of the plaintiffs' case, the examination of their witnesses, and the consideration of a great mass of correspondence and other documents. The defendants elected not to call any witnesses.

Haldane, Q.C., *Astbury, Q.C.*, *Martelli*, and *J. F. Carr*, for the plaintiffs.

Sir E. Clarke, Q.C., *Warmington, Q.C.*, and *Austen-Cartmell*, for Close Brothers & Co.

Swinfen Eady, Q.C., *Younger, Q.C.*, and *Bryan Farrer*;

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H. Terrell, Q.C., and *A. H. Jessel*; and *A. E. Balfour*, for other defendants.

His Lordship reserved judgment, and on July 27 dismissed the action, and ordered the plaintiffs to pay the costs of Close Brothers & Co.

Sir E. Clarke Q.C. I ask your Lordship to order the plaintiffs to pay our costs on the higher scale: Rules of the Supreme Court, 1883, Order LXV., r. 9. They have charged us with fraud and conspiracy in America, and have in this way put us to great expense in bringing witnesses from that country. A charge of fraud was formerly considered sufficient ground for giving costs on the higher scale: *Harrison* v. *Leutner* (1); *Pooley's Trustee* v. *Whetham*. (2) That rule has been modified by *Paine* v. *Chisholm* (3), and it is now necessary to find special grounds arising out of the nature and importance, or the difficulty or urgency of the case. The nature of this case is a charge of fraud, and there are special circumstances arising from that charge. Costs on the higher scale will be given as a substantial protection against charges of fraud, in analogy to the practice of the Probate Division, where costs are given against persons who make charges of fraud or undue influence without success. No doubt the length of the case, the amount involved, and the difficulty of the questions are not sufficient grounds for allowing costs on the higher scale: *Williamson* v. *North Staffordshire Ry. Co.* (4); but in addition to those considerations, all of which are present in this case, there are these charges of fraud, which have been based on the plaintiffs' own evidence, and have broken down so completely that it was unnecessary for us to call our witnesses.

[BUCKLEY J. Fraud is an element to be considered. A person accused of fraud may in some cases (as, for instance, where directors are in a winding-up petition accused of fraud) appear separately and defend himself, and his opponent may have to pay more than one set of costs.]

(1) (1883) 24 Ch. D. 594.
(2) (1886) 33 Ch. D. 111.
(3) [1891] 1 Q. B. 531.
(4) (1886) 32 Ch. D. 399.

That each point taken separately is insufficient does not prove that all taken together are not enough. It cannot be that the rule has no application except to cases in which experts are called as witnesses, as in *Ellington* v. *Clark, Burnett & Co., Limited.* (1) The decision in *American Braided Wire Co.* v. *Thomson* (2) did not go so far as that.

Astbury, Q.C., for the plaintiffs, was directed to confine his argument to the effect of the allegation of fraud. *Harrison* v. *Leutner* (3) was under the old rule, and does not touch this point. In *Pooley's Trustee* v. *Whetham* (4) the order was made without any argument. The present rule is clearly laid down in *Paine* v. *Chisholm* (5), in which costs on the higher scale were refused although fraudulent misrepresentation was charged. It is, therefore, settled that a charge of fraud is not in itself a sufficient ground for giving costs on the higher scale. The difficulty of this case was solely due to the amount of correspondence which had to be considered, and ordinary questions of fact and law. That is not enough. No scientific witnesses were necessary, and the defendants elected not to call their witnesses; so they have no claim for such costs. The addition of a charge of fraud to difficulties of law and fact is not enough to induce the Court to give costs on the higher scale.

Sir E. Clarke, Q.C., in reply.

BUCKLEY J. I wish it were in my power in every case to make the unsuccessful litigant indemnify the successful litigant against all reasonable costs; but it is not so. There is a scale of costs which is allowed, and my only power is to enlarge that under circumstances which are defined in Order LXV., r. 9. Under that rule I can allow costs on the higher scale, "If on special grounds arising out of the nature and importance or the difficulty or urgency of the case" I think that such allowance ought to be made. That is the only power I have. In the case of *Williamson* v. *North Staffordshire Ry. Co.* (6), Cotton L.J.

(1) (1888) 5 Rep. Pat. Cas. 319, 328.
(2) (1890) 44 Ch. D. 274.
(3) 24 Ch. D. 594.
(4) 33 Ch. D. 111.
(5) [1891] 1 Q. B. 531.
(6) 32 Ch. D. 399.

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said that he had great difficulty in understanding the meaning of the rule. I share that difficulty, but I have to grapple with it as best I can in order to ascertain what is meant by special grounds arising out of the nature and importance or difficulty or urgency of the case. I have the guidance of the Court of Appeal to this extent. *Williamson* v. *North Staffordshire Ry. Co.* (1) plainly decided this—that the facts that the amount in dispute is large, and that the questions of fact and of law to be determined are difficult, do not bring the case within the rule. I must, therefore, disregard the circumstance that the preparation of the brief was a matter of great difficulty or labour. It would be so in any case which involved difficult questions of fact and law. The Court of Appeal says that that is not enough. Then is an allegation of fraud a special ground, for there must be a special ground? In the case of *Paine* v. *Chisholm* (2) Lord Esher says this: "The conditions, therefore, on which such an order may be made are these: first, there must be something in the nature and importance of the case, or there must be difficulty or urgency in it; and then there must also be special grounds arising therefrom for making the order." So that I must find that there is something in the nature and importance or difficulty or urgency of the case, and special grounds arising therefrom, which lead me to think that costs on the higher scale ought to be paid. The special ground suggested here is that the pleading alleges fraud and misrepresentation, and that it attributes to the defendants fraudulent conduct. Is that by itself a sufficient special ground, or is it not? It seems to me that I ought to consider the question from this point of view, namely, What is the nature of the case? It is a case of alleged fraud. From that fact do any special grounds arise for allowing costs on the higher scale?

I do not see that there necessarily arises from the fact that fraud is alleged a special ground, so that the party in the wrong ought to pay more. I think the meaning of the rule is that it is to apply where the nature and importance or difficulty or urgency of the case necessitate the expenditure of more money. An illustration of this is found in cases which from their

(1) 32 Ch. D. 399. (2) [1891] 1 Q. B. 534.

nature require that a more expensive class of witnesses shall be called, such as patent cases, where the evidence which is given by the successful party is that of expert witnesses, who have to be paid according to their professional experience and capacity. This is but an illustration. Urgency might in some cases increase the necessary expense and importance and difficulty might do the like. But it is necessary, I think, to find something definite which necessarily increases the reasonable expense incurred to call the rule into action. I do not find myself in a position to lay hold of the mere fact that fraud is alleged as a special ground for ordering the plaintiff to pay more than the usual costs. On these grounds it appears to me that I ought to refuse this application. In the case of *Paine* v. *Chisholm* (1), which was a case of fraudulent misrepresentation as to the sale of a public-house, the Court of Appeal reversed an order allowing costs on the higher scale, holding that the conditions which gave jurisdiction to make such an order had not been satisfied. I do not know that the case went as far as I am going here. The Court rested their decision on the facts that there was no difficulty in getting up the case, and that it was an ordinary sort of case. I do not say at all that the present is an ordinary sort of case: it has involved a great deal of investigation; but according to *Williamson* v. *North Staffordshire Ry. Co.* (2) the facts that the amount at stake is large and the questions of fact and law are difficult are not enough. To this it must be added that a charge of fraud in a simple case is not in itself sufficient: *Paine* v. *Chisholm.* (1) Therefore, it seems to me that I must hold, consistently with those two decisions of the Court of Appeal, that the mere fact that fraud is alleged in this case is not a special ground within Order LXV., r. 9. I therefore give the costs on the lower scale.

Solicitors: *Watson-Thomas & Co.; Longbourne, Stevens & Co.; Lee & Pembertons; Emanuel & Simmonds; Renshaw, Kekewich & Smith.*

(1) [1891] 1 Q. B. 531.

(2) 32 Ch. D. 399.

H. C. R.

BUCKLEY J.

1900

Aug. 8.

CLARKSON *v.* ROBINSON.

[1896 R. 491.]

Will—Trustee—Power to Charge for Professional Services—"Professional or other Charges"—Non-professional Services.

The testator directed that "any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate, and carrying out the trusts, powers, and provisions of this my will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person":—

Held, that this clause enabled a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course or not in the ordinary course thereof, but did not authorize him to charge for work done outside his profession or business.

Further Consideration of an action for the administration of the estate of John Peter Robinson, deceased.

John Peter Robinson by his will, dated February 25, 1891, appointed Thomas Peter Clarkson, architect, Philip Goddard, gentleman, Richard Rabbidge, chartered accountant, George James Wenham, gentleman, and William Hitchins, solicitor, to be trustees and executors of his will, and bequeathed to each of them who accepted the trusts 500*l.* free of duty. He empowered his trustees to sell his businesses, or to continue to carry on the same, or to convert the same into a company, to sell and to lease and manage real and leasehold estates until sale, and to employ agents; and the will proceeded as follows: "I direct that the said William Hitchins shall be the solicitor to my estate and to my trustees and executors in the management and administration of my estate and carrying out of the trusts, powers, and provisions of this my will. And also that he and any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the manage-

ment and administration of my estate and carrying out the trusts, powers, and provisions of this my will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person."

At the time of his death the testator was the proprietor of a large silk-mercer's business in Oxford Street and other businesses; he was also engaged in erecting houses and in farming. His personal estate was sworn for probate at the sum of 1,079,159*l.* 5*s.* 9*d.*, and his freehold estate at the sum of 138,419*l.* 15*s.*

Messrs. Clarkson, Rabbidge, and Hitchins had been regularly employed by the testator in their professional capacity; Mr. Goddard was one of his managers; and Mr. Wenham was his steward and outdoor manager. Upon the death of the testator they, as trustees, took possession of and carried on the businesses and managed the property, and for this purpose held weekly meetings, which it was stated usually occupied more than two hours each. For the time taken up by these attendances they claimed to make a charge against the estate in addition to professional charges for work done by any of them for the estate.

In 1896 the Oxford Street business was, with the sanction of the Court, sold to a company formed for that purpose. The trustees continued their meetings, and it was admitted that they had managed the estate to great advantage and at a large expenditure of time and labour on their part. Their charges had been paid, and appeared in their accounts as disbursements. The master disallowed them, and submitted for the consideration of the Court, on the hearing of the action on further consideration, the question whether the payments to the trustees were proper to be allowed.

H. Terrell, Q.C., and *MacSwinney*, for the trustees. The trustees ask that their claims for remuneration for professional and also for non-professional work done for the estate should be allowed, for a reasonable amount to be fixed by the master. All these charges are authorized by the clause for that purpose

BUCKLEY J. 1900 CLARKSON v. ROBINSON.

in the will. The testator has given them these payments as legacies, in addition to the legacies of 500*l.* apiece given in the earlier part of the will, and the case is covered by *In re Fish.* (1) The testator knew that business men could not be expected to devote enough time to the management of such an estate unless they were remunerated, and he has given express directions that they are to be paid all usual professional and other charges. "Other" means charges for work which is not professional: it does not mean other professional charges. The words "whether in the ordinary course of his profession or business or not" shew that non-professional work is also to be paid for. True, if a trustee were not in any profession or business, as, for instance, if he were a country gentleman, he could not under this clause charge for his time; but that is because his time is considered to be of no value. A business man's time is his income, and if you take the former you take the latter. The word "strictly" does not narrow this construction. Throughout the clause there are two categories of charges—professional and non-professional.

Astbury, Q.C., and *Brabant*, for the testator's children, some of whom were infants. The children who are of age approve of the course taken by the trustees and support this application. The infants are not able to consent to it, but it is clearly to their interest that the trustees should continue to manage the estate, and their advisers do not wish to refuse this remuneration.

T. T. Method, for infant grandchildren, took the same view.

H. Terrell, Q.C., in reply.

BUCKLEY J. stated the facts and read the clause in question, and proceeded:—It appears to me that the words in that clause "and be paid all usual professional or other charges for any business done" mean "and be paid all charges usual in the profession or business for any business done." Then, lower down, I think that the words "whether in the ordinary course of his profession or business or not" mean whether in the

(1) [1893] 2 Ch. 413.

ordinary course of his profession or business or not in the ordinary course of his profession or business, or, to express it in another way, in the course of his profession or business, whether in the ordinary course thereof or not in the ordinary course thereof. I think that is made more plain by what follows: "and although not of a nature strictly requiring the employment of a solicitor or other professional person." It appears to me that under this clause you must see whether the work done is done in the profession or in the business of the trustee or executor who is seeking to charge for it; and if it be work done in the course of that business, then, notwithstanding that he is a trustee or executor, he is entitled to the charge usual in his profession, if it be a profession, or usual in his business, if it be a business. You are not to see whether the work has been done in the ordinary course of his profession or business; you are to see whether in fact it has been done in the course of his profession or business. You are not to inquire whether the trustees employed him, or whether he was employed by the trustees in the ordinary course of business and was entitled to charge; you are simply to see whether in fact, in the course of his business, he did work for which it is usual to make a charge. You are not to consider whether the business was such as strictly to require his employment; you are to see whether in fact he did the work. It seems to me that to satisfy this clause you must find out whether the work was done in the course of his profession or business, although not necessarily in the ordinary course, nor strictly required.

The case of *In re Fish* (1) was referred to as an authority to the contrary; but it appears to me that really what I have to do here is simply to construe the testator's will, and upon the construction of one will the language of another is, of course, little guide. But I find that in *In re Fish* (1) there are these words, which, to my mind, make a material difference: "including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor." Directly the Court read those words they had

(1) [1893] 2 Ch. 413.

BUCKLEY J. 1900 CLARKSON v. ROBINSON.

materials upon which to found themselves for the purpose of seeing, not whether, as I have to see, the man had done something in a profession or business, but whether he had personally done it; and then if he had personally done it, according to the language of *In re Fish* (1), he was to be paid for it. All I understand the Court of Appeal to have said in that case is that in wills with words such as those a solicitor—he was a solicitor in that case—was entitled to be paid, not merely for work which he did as solicitor, but for the time and trouble that he gave as trustee, although it was not given to solicitor's work at all. I have looked anxiously to see whether I could find in this clause any words which went to shew that a trustee was to be paid for his time and trouble outside his profession or business as distinguished from being paid for work done in the ordinary course or outside the ordinary course of his profession or business, and I have not found any, and counsel have not been able to assist me in finding any.

I regret to come to this conclusion, the more for this reason—that all the beneficiaries under this will—and several are adults—think it is quite fair that the trustees should be paid for the time and trouble given, and I understand it has been given heartily and ungrudgingly and with good results. I have not been assisted by any argument to shew that in the interests of the infants the construction ought to be what I am sorry to say I think it is, because in the interests of the infants, so far as their guardians and counsel can see, it would be beneficial to the infants that this course of management should go on. So far as I am personally concerned, I should wish the trustees to be paid. I come therefore to the conclusion at which I have arrived adversely to everybody.

The contention that has been put forward is this: that the trustees under this clause are entitled to be paid for work done and time and trouble given in and for the management of this estate, and carrying out the trusts, powers, and provisions of the will, whether done in the course of their profession or business or not. I regret to say I cannot find that in the clause. The clause is addressed to the case of trustees or executors who are

(1) [1893] 2 Ch. 413.

solicitors or other persons engaged in any profession or business, and it seems to me that the construction at which I am invited to arrive would reduce it to this—that if a person who was not engaged in any profession or business was appointed a trustee and gave time and trouble to the estate he would not be paid; but if a person was engaged in a profession or business, then he would be paid for everything he did whether in his profession or business or not. I confess I do not think that that is a sensible construction to be given to the words.

I have therefore arrived with regret at the conclusion that the charges which the master ought to allow are to be limited according to the principles which I have indicated.

Solicitors: *Caprons, Hitchins, Brabant & Hitchins; Dangerfield, Blythe & Hodgson.*

H. C. R.

WRIGHT J.
1900
July 25, 26; Aug. 1.

In re SUNLIGHT INCANDESCENT GAS LAMP COMPANY.

Company—Winding-up—Court's Power to Appoint Additional Liquidator in Voluntary Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 141.

Sects. 138 and 141 of the Companies Act, 1862, enable the Court having jurisdiction to wind up companies to appoint a liquidator in a voluntary winding-up, not only where there is no liquidator acting or in the place of a liquidator who is by the Court removed from his office, but also in any other case where due cause is shewn for appointing a liquidator—e.g., when an additional liquidator is required—and the appointment may be made on the application of the existing liquidator.

THE Sunlight Incandescent Gas Lamp Company, Limited, was incorporated in January, 1895, with a capital of 15,000*l.* in shares of 5*l.* each, and its only regulations were those contained in Table A in the first schedule to the Companies Act, 1862.

Special resolutions were passed and confirmed on December 28, 1898, and January 12, 1899, that the company should be wound up voluntarily, and appointing F. Belcher and L. Morris liquidators.

Belcher having retired, James Fraser was appointed liquidator in his place, to act with Morris.

On July 25, 1899, Morris applied for leave to take certain misfeasance proceedings, but the application was opposed by Fraser, and on November 17, 1899, the registrar made an order appointing C. F. Kemp "additional liquidator" to act jointly with Morris and Fraser, but he was not to act without the leave of the Court.

On an application by Kemp, to which the other liquidators were respondents, an order was made on March 14, 1900, giving the applicant liberty, without joining Morris and Fraser, to take such proceedings under s. 10 of the Companies (Winding-up) Act, 1890, and against such persons as he might be advised.

No appeal was brought from the order of November 17, 1899, or that of March 14, 1900.

Acting on the order of March 14, 1900, Kemp took out a summons under s. 10 of the Act of 1890 against J. H. H. Duncan and O. Wethered, two of the directors of the company.

Theobald, Q.C., and *Clauson*, in support of the summons.

Jenkins, Q.C., and *Coldridge*, for Duncan. There is a preliminary objection to the summons: Kemp's appointment as liquidator was invalid. In a voluntary winding-up the only cases in which the Court can appoint a liquidator are—(*a*) where a vacancy has occurred, or (*b*) where there is no acting liquidator: Companies Act, 1862, ss. 140, 141; Buckley on Companies, 7th ed. p. 357. The sections cited do not extend to a case like this. Sect. 141 contemplates the application being made by a contributory, not by an existing liquidator, and s. 138 does not help the liquidator. Except in the case of misconduct, or as part of a supervision order, there is no reported case of the Court appointing a liquidator in the case of a voluntary winding-up.

Rowden, Q.C., and *Carrington*, for Wethered.

P. M. Francke, for shareholders opposing the application.

Theobald, Q.C., and *Clauson*, for the applicant. Kemp was properly appointed liquidator by an order which has not been appealed from, and on which he is entitled to rely. The order cannot be treated as a nullity because it is now suggested that the Court had no jurisdiction to make it.

Jenkins, Q.C., in reply. The orders of March 14, 1900, and November 17, 1899, were both nullities—at any rate, as regards the respondents who were parties to the applications on which they were founded, and who had no locus standi to apply to discharge the order: *Attorney-General* v. *Hotham*. (1)

If there is a technical objection in the way of the respondents by reason of no cross-summons having been taken out, I ask to be treated as now applying to stay the proceedings or discharge the orders.

WRIGHT J. I think I must allow the case to go on, although, if I make any order on the application against the respondents,

(1) (1827) 3 Russ. 415.

WRIGHT J. 1900 SUNLIGHT INCANDESCENT GAS LAMP COMPANY, *In re.*

I shall of course stay execution and give them an opportunity of appealing from my decision. My reasons for so deciding on the preliminary objection taken by the respondents are—first, that the order appointing Mr. Kemp stands, no appeal having been brought from it, and no steps having been taken to stay proceedings under it; and, secondly, that I am not satisfied that there was no jurisdiction to make the order. The order appears to have been made with the concurrence of the rival liquidators.

I incline to the opinion—although I express it with great diffidence—that the meaning of s. 141 is that the Court may appoint a liquidator in a voluntary winding-up, not only in the cases specified in the section, but in any other case "on due cause shewn," for otherwise the last part of the section is tautologous and unnecessary. The first part of the section says that if from any cause whatever there is no liquidator acting the Court may appoint one; and the latter part says that on due cause shewn the Court may "remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up." If, therefore, a sole liquidator was removed, as he might be, by the Court, the Court could under the first part of the section appoint some one in his place, without the aid of the words in the latter part of the section, "and appoint another liquidator." These words appear to give the Court power to appoint another liquidator, not only on removing one from office, but in any other case in which due cause is shewn for calling for the Court's interference.

[The case then proceeded, and the summons was dismissed.]

Solicitors: *Linklater, Addison, Brown & Jones; Maddisons; H. C. Godfray.*

F. E.

In re HARPUR'S CYCLE FITTINGS COMPANY.

WRIGHT J.

1900

Aug 10.

Company—Winding-up—Landlord—Distress—Bill of Exchange for Rent—Debentures—Receiver—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 138, 163.

H. granted a lease to X. which was purchased by a company, but no assignment of it was taken. The company, however, entered into occupation of the demised premises, and gave H. bills of exchange for rent overdue, which bills were dishonoured. After the dishonour the company passed an extraordinary resolution for voluntary winding-up, and then the landlord distrained for the rent on the company's chattels. These, however, were subject to a floating security contained in debentures covering all the company's assets, which were insufficient in value to satisfy the debenture debt. No receiver had been appointed. The liquidators having moved to restrain the landlord from proceeding with the distress:—

Held, (1.) that, but for the existence of the debentures, and notwithstanding *Ex parte Clemence*, (1883) 23 Ch. D. 154 (which the Court declined to follow), the landlord would have been restrained, as he had a right to prove in the winding-up; but (2.) that, as the assets were covered by the debentures and were insufficient to satisfy the debenture debt, the liquidator had no right to intervene, following on this point *Ex parte Purssell*, (1887) 34 Ch. D. 646, and that the non-appointment of a receiver made no difference.

Harpur's Cycle Fittings Company, Limited, was incorporated in 1898 under the Companies Acts, 1862 and 1893, one of its objects being to acquire and carry on a business formerly carried on by another company with a similar name. The assets purchased included a lease of the business premises in Price Street, Birmingham, granted by George O'Connor Holloway to the predecessors in business of both companies; but the purchasing company (although it had gone into occupation of the works comprised in the lease) had not taken an assignment of the lease.

The company gave Holloway two bills of exchange, each for 45*l.*, for the quarter's rent due on March 25, 1900, but the bills were dishonoured before the commencement of the voluntary winding-up of the company, namely, June 19, 1900, when an extraordinary resolution was passed for the voluntary

WRIGHT J. winding-up of the company, and appointing T. P. Harpur and T. J. B. Hasell liquidators.

1900

HARPUR'S CYCLE FITTINGS COMPANY, *In re.*

On July 27, 1900, Holloway levied a distress on the company's goods on the leasehold property for 90*l.*, the amount covered by the bills, and on July 30 the liquidators served on Holloway a notice of motion for an injunction restraining him from proceeding with the distress.

The company had issued debentures for 7000*l.* covering all the assets of the company, which were not of sufficient value to pay the debenture-holders in full. The debenture-holders had not appointed a receiver or commenced proceedings to enforce their security, and they were not served with the notice of motion or represented at the hearing.

G. F. Hart, in support of the motion. The effect of taking the bills of exchange is that Holloway can only prove in the winding-up, and cannot distrain for the rent. As regards privity, by giving the bills the relation of debtor and creditor was created between the company and Holloway, and that gives him the right to prove, and takes away the right of distress which he would have if he were merely a landlord without a right to prove. Jessel M.R. says: "It would be monstrous to hold that this section"—s. 163 of the Companies Act, 1862—"deprived the landlord of his right to take the goods of a stranger to him, simply because the stranger was a company in liquidation, without giving him the correlative right of proving against the company's assets, and being paid pro ratâ with the company's creditors": *Ex parte North Staffordshire Ry. Co.* (1) Those observations, however, only apply where the landlord is not in a position to prove.

Taking a bill of exchange for rent is some evidence of an agreement by a landlord to suspend his remedy by distress during the currency of the bill: *Palmer* v. *Bramley*. (2) In the present case, however, the bills, having been dishonoured, are no longer current.

The rule that a landlord will not be allowed to distrain after

(1) (1874) L. R. 19 Eq. 60, 68. (2) [1895] 2 Q. B. 405.

the commencement of a winding-up where he can prove for the rent was held by Fry J. not to apply where the company was an undertenant only, and had given the landlord a promissory note for the rent overdue: *Ex parte Clemence.* (1) Possibly the case is distinguishable on the ground that the promissory note was given as a collateral security for the debt; but it has been questioned in Lindley on Companies, 5th ed. p. 679, and Buckley on Companies, 7th ed. p. 267. Another objection to the motion is that the assets are insufficient to satisfy the debenture debt, and therefore that the liquidators do not represent any one having any interest in the assets, and have no right to interfere; and *Ex parte Purssell* (2) is relied on in support of this view; but in that case the debenture-holders had obtained the appointment of a receiver. There is a difference when the security of the debenture-holders is still a floating one.

The liquidator is bound to see that the creditors are paid, and that none of them obtain an undue preference.

Eustace Smith, for Holloway. *Ex parte Purssell* (2) is a direct authority in favour of the landlord—the ground being that the debenture debt was much more than the proceeds of sale of the only property of the company, and that the liquidator, therefore, had no right to interfere.

[He was stopped.]

WRIGHT J. I cannot now make any order as between the landlord and the debenture-holders.

Perhaps I ought to say something about what is probably the most difficult point in the case—that is to say, whether a landlord is deprived of his right to distrain where the lease has not been assigned to the company, but the company has given him for the rent overdue a bill of exchange which has been dishonoured. The principle seems to be that a landlord is allowed, notwithstanding liquidation, to pursue his special remedy by distress where he is not a creditor of the company, because otherwise, not being entitled to prove, he would be without a remedy. But here the landlord holds bills of exchange

(1) 23 Ch. D. 154. (2) 34 Ch. D. 646.

WRIGHT J. 1900 HARPUR'S CYCLE FITTINGS COMPANY, *In re.*

given by the company, and is therefore a creditor of the company although the bills have been dishonoured. I am aware that in *Ex parte Clemence* (1) it was held that a landlord, although he had a collateral security in the shape of a promissory note given by the company, ought not to be deprived of his remedy by distress. There is no evidence in the present case that the bills were given as a collateral security. No doubt the bills were only accepted as a provisional satisfaction of the landlord's claim, and on the bills being dishonoured there was a right of proof against the company.

But apart from that, the decision of Fry J. in *Ex parte Clemence* (1) has been disapproved of in Lord Lindley's book on Companies, 5th ed. p. 679, and in Buckley J.'s book on Companies, 7th ed. p. 267, and by Kay J. in *Ex parte Pursell* (2), in which case the Court of Appeal declined to express any approval of *Ex parte Clemence*. (1)

Under the circumstances, I think I ought not to act on the decision of Fry J., and therefore, as between the landlord and the liquidators, I must hold that the landlord has not a right to distrain, the reason being that he has a right to prove.

But a further question has to be considered.

The debenture-holders have a charge for an amount which exceeds the value of the company's assets, but they have not as yet obtained the appointment of a receiver. If they had done so, *Ex parte Pursell* (2) would have applied, and the liquidators would have had no right to intervene.

Then does the fact that no receiver has been appointed make any difference? Having regard to the judgment of Lindley L.J., it seems to me that it does not. He says (3): "When we look at the facts of the case, it is clear that they"—the goods of the company—"were mortgaged to the debenture-holders for more than their value. Therefore, for all practical purposes, they were not the goods of the company. Consequently, as between the landlord and the debenture-holders the landlord is entitled to distrain."

That seems to be in point to shew that the company has no

(1) 23 Ch. D. 154. (2) 34 Ch. D. 646.
(3) 34 Ch. D. 662.

interest in the goods. It is true that Cotton L.J. (1) mentions the fact that the debenture-holders had obtained a receiver, but I cannot say that his decision proceeded on that ground.

I think, therefore, that I ought to follow Lindley L.J., and hold that the company has no interest in the property, and that the liquidators have no right to intervene.

The motion, therefore, will be dismissed.

Solicitors for liquidators: *Michael Abrahams, Sons & Co., for Jeffery Parr & Hasell, Birmingham.*

Solicitors for Holloway: *Harrison & Davies, for Hooper & Ryland, Birmingham.*

(1) 34 Ch. D. 660.

F. E.

C. A. 1900 Aug. 3, 6.

ECCLESIASTICAL COMMISSIONERS *v.* PINNEY.

[1896 E. 346.]

Vendor and Purchaser—Specific Performance—Purchase of Land by Trustee of Settled Estates—Entry by Tenant for Life—Payment of Interest on Purchase-money—Non-payment of Principal—Remedy against Owners of Estates—Trustee's Right of Indemnity—Subrogation—Vendor's Lien.

In 1873 the vicar of a parish, with the consent of the patron of the living and the approval of the Ecclesiastical Commissioners, contracted, under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, to sell the glebe land of the vicarage for 24,963*l.* to the trustee of a will by which estates were devised in strict settlement. The then tenant for life and the Commissioners were parties to the contract. Under the will the trustee held the testator's personal estate upon trust for investment in the purchase of land to be settled to the same uses as the settled estates. The title was accepted, and the tenant for life, with the approval of the trustee, entered into possession of the glebe land and paid the vicar interest on the purchase-money, and this payment was continued by successive tenants for life to the vicar and his successor until 1896, the purchase-money not having been paid. At the date of the contract the trustee had no trust funds under his control available for the payment of the purchase-money, the whole or nearly the whole of the testator's personal estate remaining after investments in land having been advanced upon the security of policies of insurance upon the life of the third tenant for life of the estates, who did not die till many years afterwards. In 1896, the purchase-money not having been paid, the Commissioners brought an action, against the then tenant for life, the personal representatives of the trustee who had entered into the contract, and the then trustees of the settled estates, for the specific performance of the contract, or for an account and a declaration that the plaintiffs were entitled to a vendor's lien on the land sold and the enforcement of the lien. The then vicar was made a defendant, and the then tenant in tail was afterwards added as a defendant. The glebe land had become of much less value than the price agreed to be given for it. The estate of the trustee who had entered into the contract had been distributed after proper statutory advertisements. The estates had been disentailed and resettled, and the money secured by the policies had been also disentailed, and had been distributed by the trustees of the resettlement among the persons entitled thereto:—

Held, that, the contract for the purchase of the glebe land having been made at a time when the trustee had no funds under his control available for the payment of the price, and it being uncertain what the value of the land might be at the time when he would be in a position to pay for it,

the contract was a speculative one not authorized by the trust for investment in land; that consequently the trustee had no right to an indemnity out of the settled estates, and that the plaintiffs had therefore no right by subrogation; that the plaintiffs had no remedy against the owners of the settled estates; and that their only remedy was by a lien for the unpaid purchase-money upon the land sold.

Decision of Byrne J., [1899] 2 Ch. 729, affirmed.

APPEAL against the decision of Byrne J. (1)

The facts of the case are fully stated in the former report, and for the purposes of the present report the following summary will be sufficient.

On July 28, 1873, the then incumbent of the vicarage of Coleshill, with the approval of the Ecclesiastical Commissioners and of the patron of the living, entered into a contract to sell the glebe land of the vicarage, in exercise of the powers conferred by the Ecclesiastical Leasing Acts, 1842 and 1858, for 24,963*l.* to R. B. Wingfield Baker, the then surviving trustee of the will of Edward, Earl Digby, who had power to invest the trust funds in the purchase of land. The tenant for life under the will was a party to this agreement and consented to the purchase, and the Ecclesiastical Commissioners were also parties. The title was accepted, and the tenant for life of the real estates settled by the will, with the approval of Baker, entered into possession of the glebe land, and until his death in 1883 paid the vicar for the time being interest on the purchase-money, and this payment was continued by the subsequent tenants for life of the settled estates until 1896. No part of the purchase-money was paid, and no conveyance of the glebe land was executed.

By the will of Earl Digby his real estates were devised in strict settlement, and his residuary personalty was bequeathed to trustees upon trust, with the approbation of the tenant for life, to invest the same in the purchase of hereditaments in fee simple to be conveyed to the same uses as the hereditaments devised by the will.

Earl Digby died on May 11, 1856. Baker died on March 25, 1880, and his estate was legally distributed after proper advertisements.

(1) [1899] 2 Ch. 729.

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On January 27, 1881, a deed was executed disentailing the settled estates, and by a deed executed on March 23, 1882, they were resettled.

The recitals in the disentailing deed shewed that the trustees of the will had invested in the purchase of land the greater part of Earl Digby's residuary personal estate, and that the whole or a considerable part of the residue had been advanced by the trustees for the purposes of a fund called "The Digby Estates Improvement Fund," and had been expended in the improvement of the estates, the repayment of the money so advanced being secured by policies of insurance, for sums amounting to 158,000*l.*, upon the life of the third tenant for life. At the time when Baker entered into the contract for the purchase of the glebe land he had not, so far as appeared, any personal estate of Earl Digby under his control out of which the purchase-money could be paid.

The disentailing deed included the glebe land, and by that deed the 158,000*l.* secured by the policies was also disentailed, and was assured so as to be subject, with the disentailed land, to a power of joint appointment by the tenant for life, the tenant for life in remainder, and the first tenant in tail. This power was exercised as to the land by the deed of resettlement of March 23, 1882.

By a deed of even date the policies for 158,000*l.*, and all moneys to become payable thereunder, were, subject to a mortgage for 30,000*l.* created in 1872, vested in the trustees of the resettlement of 1882, in trust for the younger children of the tenant for life. The sum thus appointed was to be taken in satisfaction of a sum of 20,000*l.*, to which they were entitled under a power to create portions contained in the will of Earl Digby.

This action was commenced in 1896 by the Commissioners against the then vicar (who declined to join as co-plaintiff); the tenant for life in possession; the personal representatives of Baker; and the trustees of the resettlement, claiming specific performance of the contract to purchase the glebe land; damages in addition to or in lieu thereof; or in the alternative an account, and a declaration that the plaintiffs were entitled

as unpaid vendors to a lien on the glebe land for the unpaid purchase-money, and that the lien might be enforced by a sale of the land.

The value of the land had become much less than the amount of the agreed purchase-money.

The whole of the 158,000*l.* secured by the policies had been received, and had been distributed by the trustees of the resettlement of 1882 among the persons entitled thereto, 20,000*l.* thereof being applied in payment of the 20,000*l.* portions.

Byrne J. held that the vendors were not entitled to any remedy but a vendor's lien for unpaid purchase-money.

In order to enforce this lien it was arranged that the first tenant in tail should be added as a defendant to the action.

The plaintiffs appealed.

Levett, Q.C., and *Pochin*, for the plaintiffs.

Neville, Q.C., and *Norton, Q.C.*, for the tenant for life and the tenant in tail.

T. H. Carson, for the vicar.

Sargant, for the trustees of the settled estates.

Brinton, for the personal representatives of Baker.

The arguments adduced were similar to those used in the Court below, and it was also contended on behalf of the defendants that the contract for the purchase of the land was not authorized by the trust for investment in land contained in the will. The ground of the decision of the Court of Appeal renders it unnecessary to report the arguments at length.

In addition to the cases cited in the Court below, *Dowse* v. *Gorton* (1) was referred to.

LORD ALVERSTONE M.R., after stating the nature of the action and the parties to it, and referring to the facts as stated in the former report, continued:—We have been asked to assume for the purposes of the case that the contract for purchase was entered into by Baker (the trustee) in pursuance of the power contained in the will of Earl Digby, that he

(1) [1891] A. C. 190.

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purported to contract in the exercise of that power, and that he was intending or purporting to apply to the payment of the purchase-money some of the testator's personal estate which he had been directed to invest in the purchase of land. It appears that prior to the contract a considerable portion of the residuary personal estate had been advanced to the estate, and its repayment had been secured by policies of insurance for the sum of 158,000*l.* I am by no means satisfied that the contract was made by Mr. Baker in the exercise of the power in the will, or in the discharge of his duty under the power. Such evidence as there is certainly does not, in my opinion, support that view, and, indeed, the correspondence appears to shew that it was intended to raise the purchase-money by selling some outlying portions of the settled estates. The foundation of this part of Mr. Levett's argument is that we ought to assume that there had been either a direct exercise of the trustee's power, knowing that the purchase-money could in some way be obtained out of the 158,000*l.*, or that there had been a breach of trust, and that inasmuch as in some proceeding Baker could have been compelled to call in some of the personal estate and to apply it towards the completion of this purchase, the Ecclesiastical Commissioners are entitled to enforce the rights of unpaid vendors against those persons who are now in possession of the settled estates, or have become trustees of the policy moneys.

The property was disentailed and resettled in 1882, and in 1888 the policy moneys were distributed.

I should add that in 1858, upon a marriage taking place, the tenant for life covenanted to exercise his power of creating portions to the extent of 20,000*l.* in favour of younger children, and that when the policy moneys were paid the 20,000*l.* was satisfied out of them, so that to that extent the settled estates obtained the benefit of part of the 158,000*l.*

Under these circumstances, who are the persons whom it is sought to make liable to the plaintiffs? First there is the present tenant for life, who is in possession of the settled estates. It is said that interest on the purchase-money has been throughout paid by the successive tenants for life. In my view, whether

the contract for purchase was or was not a breach of trust, or whether it was hoped that the money would be raised by means of the sale of outlying portions of the settled estates, it is impossible to hold that this is one of that class of cases in which the contract can be made good out of the interests enjoyed by the persons from time to time entitled to the estates. I do not think it is necessary to consider under what circumstances such a right could be enforced against the persons entitled to the estates. I am clearly of opinion that the fact that the property sold has by virtue of the disentailing deed and the resettlement become part of the settled estates does not give the vendors the right to have the contract made good out of the whole of the settled estates, or out of the interest of the person who has become entitled to the income of the settled estates.

With regard to the executors of Baker, it is not suggested that there is any remedy against them personally. It is said, however, that they did not distribute their right to an indemnity out of the estates. In my opinion that question does not arise, because I think the contract was not one in respect of which, under the circumstances, the vendors can claim an indemnity as against the persons who have become entitled to the settled estates.

As regards the trustees of the resettlement, it is said that they have distributed the policy moneys with constructive (not actual) notice of the existence of this contract—a notice binding them in law. I think it is impossible to say that, having had no actual notice (I do not say they would be liable even if they had had actual notice) upon the allegations in the pleadings or upon the evidence, there was any personal liability of the trustees by reason of the part which they took in distributing the policy moneys under the disentailing deed and the resettlement in 1882.

Lastly, as regards the tenant in tail, who was made a party only in order to give effect to the judgment of Byrne J., it is not contended that any remedy could be enforced against him.

For these reasons I am of opinion that the judgment of Byrne J. was right, and that the appeal ought to be dismissed.

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RIGBY L.J. The question really is who is to bear the loss resulting from the very serious depreciation in value of the glebe land contracted to be purchased for the benefit of the settled estates of the Digby family. The Ecclesiastical Commissioners, on behalf of all the persons interested in the glebe land, ask that the contract for purchase may be carried into effect.

The first question, which lies at the root of the matter, is this—was there a valid purchase of the glebe land for the benefit and on account of the Digby family estates, and I am of opinion there was not. If that be established, there can be no right of the trustee to be indemnified out of the estates, or of the vendors of the land to be subrogated to the trustee's right of indemnity. How does the matter stand? Mr. Baker was the surviving trustee of the will of Earl Digby, who bequeathed his residuary personal estate upon trust to invest it in the purchase of real estate. There was also a power of sale and exchange of the lands subject to the will. At the time when the contract was entered into it does not appear that Mr. Baker had a farthing of trust money under his control to expend. The personal estate had been advanced (whether in breach of trust or in pursuance of a trust) for the purposes of a fund known as "The Digby Estates Improvement Fund," and the money thus advanced was to be repaid out of the proceeds of policies which would fall in at the death of the third tenant for life. At the time of the contract for purchasing the glebe land there was no possible means of obtaining the money to pay for them until the death of that tenant for life, who, in fact, lived for many years afterwards. If the money had been advanced in pursuance of a trust, it is obvious that by no means could it be made available for the purchase of land until the death of the tenant for life. If it were not so it cannot be supposed that a trustee would be able to advance out of his own moneys 158,000*l.*, the amount secured by the policies, even to make good a breach of trust, and it is plain from the correspondence that Mr. Baker never dreamt of doing such a thing. He entered into the contract, which was believed, not only by himself but by all the persons then in existence who were interested in the settled estates, as well as by the then incumbent of the living to

which the glebe belonged, to be greatly for the benefit of all the parties concerned. If in entering into the contract Baker was guilty of a breach of trust, he certainly did not act from any improper motive, but he really thought he was doing that which would be for the advantage of all the persons concerned. But it came to this—that he agreed to give about 25,000*l.* for the glebe land under a contract which was to be completed by payment of the purchase-money when he should have the money, and that left it doubtful whether the land purchased would or would not at the time of completion be worth the 25,000*l.* No one could possibly say how that would be. If in the event, as we are told is actually the case, the value of the property should have fallen to 10,000*l.*, then 25,000*l.* would have to be paid out of the trust funds for property worth only 10,000*l.* The trustee was no doubt trying to do the best he could, and incurring a risk for the benefit of the persons interested in the estates, but he was entering into a contract as to which he could not have the slightest idea whether when it was carried out it would be one into which he could properly enter under the trust in the will.

In my opinion that was a clear breach of trust, and it follows that he had no right to be indemnified out of the estates, and no question of subrogation to his right of indemnity can possibly arise, and the persons who are interested in the glebe land, and the Ecclesiastical Commissioners as representing them, have no right as against the settled estates. It is said that the glebe land thus purchased has been dealt with as part of the settled estates, and that the successive tenants for life as and when they have come into possession of the estates have continued to pay interest on the purchase-money to the vicar for the time being. That certainly has not been to his detriment. He has in fact been better off than if the contract had never been entered into. The only way in which the vicar will now be affected is that the payment of interest cannot be continued. The persons in possession of the settled estates are, I understand, ready to give up the property or to pay its present value, and this will be in substance the same thing as enforcing a vendor's lien or rescinding the contract,

C. A. 1900 ECCLESIASTICAL COMMISSIONERS v. PINNEY. Rigby L.J.

for it is agreed that the property is now worth far less than the 25,000*l.* which was to be paid for it; so that the plaintiffs will get the full value of the property.

Under these circumstances there has really not been any claim before us that the property should be reconveyed to the vicar. He, and the Ecclesiastical Commissioners on behalf of him and his successors, are willing to take the money which would be got by the sale of the property; and in my opinion that is the utmost which they can now require. The successive incumbents must bear the loss, and not the owners of the settled estates.

Some other questions of interest have been discussed, but it is not necessary now for me to express any opinion upon them. I base my judgment entirely upon the ground that there never was a contract which as against the settled estates could be treated as a proper and binding contract.

COLLINS L.J. I am of the same opinion, and on the same grounds.

Solicitors: *Milles, Jennings-White & Foster; Dawson, Bennett & Ryde; Hulberts, Hussey & Metcalfe.*

W. L. C.

DAY *v.* KELLAND.

C. A.
1900
Oct. 25.

[1892 D. 2391.]

Mortgage — Foreclosure — Redemption — Solicitor Mortgagee — Profit Costs — Mortgagees Legal Costs Act, 1895 (58 & 59 *Vict. c.* 25), *s.* 3—*Retrospective Effect.*

In April, 1893, upon a foreclosure summons by a solicitor mortgagee, an order was made directing an account of what was due to the plaintiff for principal, interest, and taxed costs of the action, followed by provisions for redemption by one of the defendants on payment of what should be found due, and foreclosure in default of payment. On February 19, 1898, on the further consideration of the action, an order was made referring it to the taxing master to tax the plaintiff's costs of the action:—

Held, that the rights of the parties were ascertained by the first order, which must be construed by the then existing law, and that the plaintiff was not entitled, by reason of the passing of the Mortgagees Legal Costs Act, 1895, to charge profit costs.

Decision of Cozens-Hardy J. affirmed.

APPEAL against an order of Cozens-Hardy J. directing the taxing master to review his taxation of costs.

The action was a foreclosure action by originating summons. The defendant Kelland was the mortgagor. The plaintiff was a solicitor. He was the transferee of an equitable mortgage by deposit of title deeds made by Kelland on February 6, 1891, to the Devon and Cornwall Banking Company, and he was also legal mortgagee from Kelland of the property comprised in the deeds under a mortgage dated March 25, 1892. The defendants to the action were the mortgagor and other mortgagees, one of whom was named Robert Cuddeford.

By the order, dated April 19, 1893, made on the hearing of the summons, it was declared that the plaintiff, as transferee from the bank, was a mortgagee of the estate comprised in the deeds. And it was ordered that an account should be taken of what was due to the plaintiff for principal and interest under and by virtue of the deposit, from February 6, 1891, until the date of the chief clerk's certificate, and mortgagee's costs and expenses (if any), and for his costs of the action, such costs to be taxed. And the Court declared that such principal, interest,

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and costs were to be considered as a charge upon the estate. And it was ordered that, upon the defendant Robert Cuddeford paying to the plaintiff what should be found due to him for principal, interest and costs, charges and expenses as aforesaid, under and by virtue of the equitable mortgage by deposit, within six months after the date of the chief clerk's certificate, the plaintiff should reconvey the property comprised in the equitable mortgage to the defendant Cuddeford free from incumbrances. In default of payment by the defendant Cuddeford to the plaintiff of what should be found due to him as aforesaid, the defendant Cuddeford was to be foreclosed of all equity of redemption in the property comprised in the equitable mortgage, except such equity of redemption as he might be entitled to subject to the mortgage of March 25, 1892.

And it was ordered that in case of such foreclosure a further account should be taken of what was due to the plaintiff under and by virtue of the mortgage of March 25, 1892, for principal and interest from the date thereof, and for his mortgagee's costs, charges, and expenses (if any), and for his costs of the action, such costs to be taxed, and similar provisions were made for redemption by and foreclosure of all the defendants.

By the order, dated February 19, 1898, on the further consideration of the action, it was referred to the taxing master to tax the costs of the plaintiff of the action, including in such costs the costs properly incurred and paid by the plaintiff to the Devon and Cornwall Banking Company in respect of their charges and expenses as mortgagees on the transfer of the equitable mortgage of February 6, 1891, and including also the costs properly incurred of the plaintiff of the legal mortgage of March 25, 1892, and including also any other costs, charges, and expenses properly incurred by the bank or the plaintiff as mortgagees as aforesaid, and not already taxed or allowed. And the taxing master was to certify the amount of such costs so far only as they related to so much of the plaintiff's security as had been declared by the order of April 19, 1893, to have priority over the security of the defendant Cuddeford, and also the residue of such costs.

Upon the taxation of costs by the master, the plaintiff

claimed to be entitled, by virtue of the Mortgagees Legal Costs Act, 1895, to charge profit costs; and the taxing master held that this claim was well founded. On a summons by the defendant Cuddeford to review the taxation, a declaration was made that the plaintiff was not entitled to any profit costs as transferee of the equitable charge of February 6, 1891, or as mortgagee under the mortgage to him of March 25, 1892, and it was referred to the taxing master to retax the plaintiff's bill accordingly. Cozens-Hardy J. was of opinion that the Act of 1895 did not apply, and that the case was governed by the decision of the Court of Appeal in *Eyre* v. *Wynn-Mackenzie*. (1)

The plaintiff appealed.

A. àBeckett Terrell, for the plaintiff. It is submitted that the learned judge was wrong in thinking that the present case is governed by *Eyre* v. *Wynn-Mackenzie*. (1) In that case the order had been made two years before the passing of the Act of 1895, and the rights of the parties had been determined. It was admitted that the order was right when it was made, but the applicant asked for an extension of the time for appealing from the order on the ground that the law as to costs had been meanwhile altered. This the Court refused to allow. That decision has no application to the present case. Sect. 3 of the Mortgagees Legal Costs Act, 1895 (2), is retrospective. That section would clearly have applied if the foreclosure order had

(1) [1896] 1 Ch. 135.

(2) Sect. 3: "(1.) Any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

"(2.) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act."

Sect. 4: "In this Act the expression 'mortgage' includes any charge on any property for securing money or money's worth."

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not been made until after the Act came into operation. But that order did not determine the principle upon which the amount due to the plaintiff was to be ascertained. Under that order there could not have been a taxation of costs, and before the order for taxation was made on the further consideration of the action the new law had come into operation, and the plaintiff is entitled to the benefit of that law.

Stewart-Smith, for the defendant Cuddeford. The first order directs an account to be taken of the plaintiff's costs, and declares them to be a charge on the property. That must mean the costs to which the plaintiff was entitled under the then existing law. The plaintiff chose to wait for five years before getting the order to tax. He might have taxed without the second order. That was required only for the declaration of priority which it contains.

Terrell, in reply. There could not have been a taxation of costs under the first order. It only directs an account to be taken by the chief clerk, though he would be assisted by the taxing master. The first order did not declare to what costs the plaintiff was entitled.

LORD ALVERSTONE C.J. In my opinion the decision of Cozens-Hardy J. was perfectly right. It is not necessary to express any opinion as to the effect of s. 3 of the Act. In my opinion the rights of the parties were determined by the order of April, 1893. Everything which has since been done in the action has been done under that order. It is said that in working out that order the plaintiff ought to have the benefit of the change in the law which was made by the Act of 1895. But to allow that would, I think, be to alter rights which were ascertained before the passing of the Act. In my opinion the view taken by Cozens-Hardy J. was right. Though the point is not directly decided by *Eyre* v. *Wynn-Mackenzie* (1), the principle of that decision applies.

RIGBY L.J. I am of the same opinion. Whatever rights were ascertained by the order of April 19, 1893, must be

(1) [1896] 1 Ch. 135.

interpreted with reference to the law as it stood at that time. I understand that to be the principle of the decision of the Court of Appeal in *Eyre* v. *Wynn-Mackenzie* (1), and, if I may venture to say so, I agree in their view.

VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Taylor, Hoare & Pilcher; H. Mear, for Dunn & Baker, Exeter.*

W. L. C.

DOUGLAS *v.* BOLAM.

[1896 D. 320.]

Judicial Trustee—Appointment—Jurisdiction of Court—Official Trustee—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-ss.* 1, 3—*Judicial Trustee Rules*, 1897, *r.* 23 (1.).

Upon an application for the appointment of a judicial trustee in place of a retiring judicial trustee, if the Court is not satisfied of the fitness of the person nominated by the applicant, there is jurisdiction to appoint a person suggested by the retiring trustee as his successor, and the Court is not in such a case bound by sub-s. 3 of s. 1 of the Judicial Trustees Act, 1896, to appoint only an official trustee.

Decision of Kekewich J. affirmed.

APPEAL against the refusal of Kekewich J. to discharge an order which he had made in chambers for the appointment of a judicial trustee of a settlement, dated June 27, 1865, made on the marriage of R. S. Douglas with Jane Eliza Adams. R. S. Douglas died on October 8, 1888, and his widow Jane Eliza Douglas, the plaintiff, was the tenant for life of the property comprised in the settlement. The settlement provided that "it shall be lawful for the said Jane Eliza Adams and R. S. Douglas during their joint lives and for the survivor of them during his or her life . . . . to exercise any statutory power of appointing a new trustee or new trustees of these presents."

The action was commenced in 1896 by Mrs. Douglas and her four daughters, who were, subject to her life interest,

(1) [1896] 1 Ch. 135.

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entitled to the property comprised in the settlement, against R. G. Bolam, the then surviving trustee of the settlement, to compel him to make good an alleged breach of trust. One of the daughters was then an infant.

On August 9, 1897, an order was made approving of terms of compromise of the action. The order stated that the defendant Bolam was desirous of retiring from the trusts, and such of the plaintiffs as were sui juris undertook to apply for the appointment of a judicial trustee under the Judicial Trustees Act, 1896.

On August 2, 1898, an order was made appointing John Broadway judicial trustee, and the defendant Bolam was thereupon discharged.

In 1899 Broadway desired to retire, and on June 20, 1899, a summons was taken out by Mrs. Douglas, asking that Broadway might be at liberty to resign the position of judicial trustee, and that Edward Brewis might be appointed judicial trustee of the settlement in his place. Brewis was the husband of one of the daughters of Mrs. Douglas. In the first instance Broadway did not give notice to the Court, as required by rule 23 (1.) of the Judicial Trustee Rules, 1897, of his desire to be discharged from his trust, but he afterwards, when this omission was pointed out by the judge, gave such a notice, in which he suggested the appointment of J. M. Winter as his successor. This appointment was objected to by Mrs. Douglas and her daughter Mrs. Brewis, but the other three daughters desired that Winter should be appointed. Kekewich J. thought that under the circumstances it would not be proper to appoint Brewis, and he made an order in chambers appointing Winter judicial trustee in place of Broadway.

Mrs. Douglas moved in court to discharge this order, and Kekewich J. refused the motion. Mrs. Douglas and Mrs. Brewis appealed.

The notice of appeal asked that the official solicitor or some other fit and proper person might be appointed judicial trustee in the place of J. M. Winter. Upon the hearing of the appeal it was admitted that the appointment of Mr. Brewis would not be a desirable one.

Ward Coldridge, for the appellants. Under sub-s. 3 of s. 1 of the Judicial Trustees Act, 1896 (1), the Court, if it does not think fit to appoint the person nominated by the applicant, can only appoint an official trustee; there is no jurisdiction to appoint a third person. At any rate, if the judge had a discretion, it is submitted that he has not properly exercised it in this case, especially having regard to the fact that under the settlement Mrs. Douglas is entitled to exercise any statutory power of appointing new trustees, and that she objects to the appointment of Winter.

Tomlin, for the other three daughters, was not heard.

LORD ALVERSTONE C.J. Upon the application of Mrs. Douglas, the tenant for life, for the appointment of Mr. Brewis as judicial trustee of the settlement in succession to Mr. Broadway, the learned judge has appointed Mr. Winter to be judicial trustee. It is contended that, under sub-s. 3 of s. 1 of the Act, if the Court is not satisfied of the fitness of the person nominated by the applicant, the Court can only appoint an official trustee instead of the person so nominated. I think that would be too narrow a construction of the Act. Mrs.

(1) By s. 1: "(1.) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shewn, in place of all or any existing trustees."

"(3.) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of a person so nominated, an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof."

Sect. 4 gives power to the Lord Chancellor to make rules for carrying into effect the Act.

Sect. 5: "In this Act—

"The expression 'official of the Court' means the holder of such paid office in or connected with the Court as may be prescribed.

"The expression 'prescribed' means prescribed by rules under this Act."

By the Judicial Trustee Rules, 1897, r. 23 (1.), "If a judicial trustee desires to be discharged from his trust he must give notice to the Court, stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor."

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Douglas has not a general power of appointing a new trustee; she is only entitled to exercise any statutory power of appointing new trustees of the settlement. The statutory power material in this case is contained in the Judicial Trustees Act. In my opinion the Court under sub-s. 1 of s. 1 has power to appoint any fit and proper person to be a judicial trustee, and to hold that this power is confined to the appointment of an official trustee, where a person who is entitled to apply to the Court to make the appointment has nominated some one of whose fitness the Court is not satisfied, would be to limit the beneficial operation of the Act. I think that sub-s. 3 does not cut down the power conferred by sub-s. 1, but applies only to the particular cases mentioned in it—namely, to give the Court power to appoint the official trustee where the Court is not satisfied of the fitness of the person nominated by the applicant. But when another fit person is suggested by some of the parties, the Court is not bound to appoint the official trustee. Upon the merits of the present case, I think no ground has been shewn for interfering with the exercise of the discretion of the learned judge. The appeal must be dismissed with costs.

RIGBY L.J. I am of the same opinion. A proper application was made to the Court for the appointment of a judicial trustee. The applicant wished Mr. Brewis to be appointed; but it has been admitted before us that that would be an impossible appointment, as it plainly would be. It is contended that if the Court does not appoint him it can only appoint an official trustee, and has no jurisdiction to appoint a third person. Rule 23 of the rules made under the Act provides that if a judicial trustee desires to be discharged he must give notice to the Court, "stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor." Here the retiring trustee did not at first comply with this rule, but, on the omission being pointed out by the learned judge, the trustee gave a proper notice, in which he suggested the appointment of Mr. Winter as his successor. In this way the name of Mr. Winter was fairly brought before the Court

as an alternative to Mr. Brewis; and I have no doubt that the Court had ample jurisdiction under the Act to appoint Mr. Winter. I am satisfied that Kekewich J. exercised the wisest discretion, and, indeed, I should have come to the same conclusion myself.

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VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *Poole & Robinson; Flux & Leadbitter.*

W. L. C.

In re J. L. YOUNG MANUFACTURING COMPANY, LIMITED.
YOUNG *v.* J. L. YOUNG MANUFACTURING COMPANY, LIMITED.

C. A. 1900 *Oct.* 30.

[1896 Y. 2056.]

Practice — Evidence — Affidavit — "Information and Belief" — Irregularity — Inadmissibility — Costs — Rules of Supreme Court, 1883, *Order* XXXVIII., *r.* 3.

An affidavit of information and belief, not stating the source of the information or belief, is irregular, and therefore inadmissible as evidence, whether on an interlocutory or a final application; and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs.

THIS was an appeal by one Ashford, claiming to rank as a debenture-holder in a company called "J. L. Young Manufacturing Company, Limited," from an order of Stirling J. refusing to admit his claim. The order was made in a debenture-holder's action in which a receiver had been appointed and judgment pronounced directing the usual inquiries as to debenture-holders. The master in his certificate found against Ashford's claim, and that finding was affirmed by the order of Stirling J.

The evidence used before the master and in the Court below for and against the claim consisted mainly of affidavits containing statements made in the common form, on the "information and belief" of the deponents, without indicating the source of the information and belief.

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1900
J. L. YOUNG MANUFACTURING COMPANY, LIMITED, *In re.*
YOUNG *v.* J. L. YOUNG MANUFACTURING COMPANY, LIMITED.

E. H. Coumbe, for the appellant.
Martelli, for the respondent, the receiver.

The Court, in allowing the appeal, made the following observations upon the affidavit evidence:—

LORD ALVERSTONE C.J. This case is one of general importance as regards the practice of the admissibility of evidence by affidavit. In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their "information and belief," without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on "information and belief" ought not to be looked at at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice.

RIGBY L.J. I will add a few words to what the Lord Chief Justice has said with regard to affidavits and the way in which they are often framed.

In the present day, in utter defiance of the order (Rules of the Supreme Court, 1883, Order XXXVIII., r. 3) (1), solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows but also of what he believes, without giving the slightest intimation with

(1) Order XXXVIII., r. 3, is as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same."

regard to what his belief is founded on. Or he says, "I am informed," without giving the slightest intimation where he has got his information. Now, every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit. At any rate, speaking for myself, I should be ready to give such a direction in any such case. The point is a very important one indeed. I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general—that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief.

VAUGHAN WILLIAMS L.J. With regard to affidavits of the sort before us, it is not quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf such affidavits are put forward the liability of paying the costs of those affidavits. The only more satisfactory remedy is one which I am aware is difficult, if not impossible, to apply as the law stands: namely, that no one should pay for these affidavits at all, and that the solicitor who has drawn these affidavits and made copies of them, and so forth, should be left out of pocket thereby.

RIGBY L.J. Vaughan Williams L.J. has gone rather further than I did just now, but I quite concur with what he has said. (1)

Solicitors: *F. E. Paynter; D. A. Romain.*

(1) See *Bidder* v. *Bridges*, (1884) 26 Ch. D. 1, *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, 287-8, and *In re Anthony Birrell, Pearce & Co.*, [1899] 2 Ch. 50.

G. I. F. C.

C. A.
1900
June 18, 19;
July 5, 12;
Aug. 3.

In re GRAINGER.
DAWSON *v.* HIGGINS.

[1899 G. 528.]

Will—Construction—Bequest of Pecuniary Legacies—Bequest of "Residue and Remainder" of Specific Mortgage Debts — Intestacy — Undisposed of Personal Estate acquired between Dates of Will and Death—Administration—Legacies, Specific or Demonstrative—Fund applicable for Payment —Ambiguity—Intention—Extrinsic Evidence, Admissibility of—Evidence dehors the Will.

A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding "and legacies"), to three persons named. At the date of the will the testator's personal estate consisted of the two mortgage debts, which were just sufficient for payment of the legacies (if payable thereout), debts, and funeral and testamentary expenses. Subsequently to the date of his will the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two mortgage debts, was not sufficient for payment of the debts, funeral and testamentary expenses, and legacies.

On an originating summons to ascertain in what order the assets should be applied:—

Held, by Stirling J., that "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies:

But *held*, on appeal, by Lord Alverstone M.R. and Collins L.J. (Rigby L.J. dissenting), that "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the general pecuniary legacies as well as of the debts, &c.:

Held, also, by the Court of Appeal, that the general pecuniary legacies were specific, and consequently that the legatees of the residue of the mortgage debts—though they were, as was admitted, entitled, if any of the debts and funeral and testamentary expenses were paid out of the mortgage debts, to have the amount so paid recouped out of the undisposed of personalty—were not entitled to throw any part of the general pecuniary legacies upon the undisposed of personalty.

The admissibility of extrinsic evidence in aid of the interpretation of wills, discussed.

THE Rev. John Grainger, a Roman Catholic priest, by his will dated May 31, 1895, and partly in a printed form filled in

and added to in his own handwriting, after appointing an executor, directed (following the printed form) that his debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. And after devising and bequeathing to the Archbishop of Glasgow for the time being certain real estate consisting of a church and presbytery in Exmouth, and their contents and the sum of 2000*l.*, the testator gave his plate and china and a large number of pecuniary legacies to various persons, and an annuity of 60*l.* to his housekeeper. He then concluded his will as follows: "All the residue and remainder of the sum of 9187*l.* lent on mortgage to Sir John Lawson . . . . and of the sum of 4000*l.* lent on mortgage to Mrs. Alicia Kirk . . . . after payment of my just debts and funeral expenses and the expense of proving this my will, I give and bequeath unto the Rev. Gilbert Higgins and unto the Rev. Augustine White and unto the Rev. Ildephonsus Layard, Canons Regular of the Lateran, of 12, Wormesley Road, Stroud Green, London, North, and of Spettesbury in Dorset and Bodmin and Truro in Cornwall."

The testator died on December 22, 1898, possessed of personal estate to a considerable amount, besides the two mortgage debts of 9187*l.* and 4000*l.*, making together 13,187*l.*; but the personal estate exclusive of the two mortgage debts was not sufficient to pay the debts, and funeral and testamentary expenses and the legacies and annuity, and the question therefore arose in what order the assets should be applied.

This action was then commenced by originating summons by the executor against the three Canons, the legatees of "the residue and remainder" of the two mortgage debts, against the testator's next of kin, and against one of the pecuniary legatees, and also against the Archbishop of Glasgow, the specific devisee of real estate, to obtain the opinion of the Court upon various questions arising upon the will.

The pecuniary legacies and the sum required to keep down the annuity of 60*l.*, amounted altogether to 11,815*l.* From an affidavit filed by the testator's solicitor in support of the summons it appeared that at the date of his will the testator's personal estate consisted of his plate and china and the two

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mortgage debts amounting together to the sum of 13,187*l.*, and a sum of 145*l.* standing to his current account at his bankers; but that between the dates of his will and of his death he became entitled under the will of his mother to 8300*l.*, and that his total personal estate at his death amounted to 22,066*l.*; that his debts, funeral and testamentary expenses, and estate duty amounted to 1364*l.*, leaving a residue of 20,702*l.* Deducting from that residue the two mortgage debts, 13,187*l.*, there remained a sum of 7515*l.* only available for the legacies and annuity, or a deficiency of 4300*l.*

On the hearing of the summons Stirling J. allowed the affidavit of the testator's solicitor to be read in order to assist the Court in arriving at a construction of the bequest of "the residue and remainder" of the two mortgage debts, and made an order declaring that the testator died intestate as to the personal estate acquired by him after the date of the will; that according to the true construction of the will, and in the events which had happened, the estate of the testator undisposed of by his will was liable for the payment of his debts and funeral and testamentary expenses, and the legacies and annuity, in exoneration of the specifically devised real estate and of the two mortgage debts; but that to the extent to which the undisposed of personal estate was exhausted in payment of the debts and funeral expenses and the expenses of proving the will, the same should be recouped out of the specifically devised real estate and specifically bequeathed mortgage debts rateably, so as to leave the undisposed of personal estate to that extent available towards payment of the general pecuniary legacies; also that the testamentary expenses (other than the expenses of proving the will, but including the costs by the order directed to be taxed and paid) so payable out of the undisposed of personal estate should be recouped out of the specifically devised real estate, so as to leave such undisposed of personal estate to that extent also available towards payment of the general pecuniary legacies; and the costs of all parties were ordered to be taxed and paid out of the undisposed of personal estate, without prejudice to the declaration thereinbefore contained.

The defendants the next of kin and the pecuniary legatee appealed from so much of that order as declared that the estate of the testator undisposed of by his will was liable for the payment of his debts and funeral expenses and the expenses of proving the will, and the legacies and annuity, in exoneration of the two mortgage debts; and asked by their notice of appeal a declaration that, according to the true construction of the will and in the events which had happened, the debts and funeral expenses and the expenses of proving the will, and the legacies and annuity, were primarily payable out of the two mortgage debts.

There was a second appeal by the defendant the Archbishop of Glasgow from so much of the order as declared that the specifically devised real estate was liable to recoup the undisposed of personal estate.

The appeals were heard on June 18 and 19, 1900. The main questions for argument arose on the first appeal, and were (1.) what meaning was to be attributed to the words, "the residue and remainder" of the two mortgage debts—whether they meant what was left of those two debts after payment of the debts, funeral and testamentary expenses only, or what was left after payment of the pecuniary legacies previously given as well as of the debts, &c.; and (2.) whether, in order to arrive at the true meaning of those words, extrinsic evidence, as furnished by the testator's solicitor, was admissible to explain the testator's intention, having regard to his knowledge, at the time he made his will, of what his property then consisted.

Theobald, *Q.C.*, and *J. Fischer Williams*, for the defendants, the next of kin and the pecuniary legatee, contended that the liability for the debts and funeral expenses, and for the expenses of proving the will, and also for the legacies and the annuity, should be thrown primarily upon the two mortgage debts; and that this was the testator's intention was clear from the amount of property which at the time he made his will he knew belonged to him.

Upjohn, *Q.C.*, and *G. R. Northcote*, for the defendant the

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Archbishop of Glasgow, the specific devisee of real estate, took the same view, and as to the meaning of the word "residue" cited *Greville* v. *Browne* (1) and *Wheeler* v. *Howell*. (2)

Jenkins, *Q.C.*, and *W. M. Cann*, for the defendants the three Canons, contended that, the question being one of construction, the Court could only look at the words of the will itself to explain the ambiguity, and should not regard parol evidence; and that the testator's intention, to be gathered from the words he had used, was to throw his debts and funeral expenses and legacies upon his entire estate.

Ingpen, *Q.C.*, for the plaintiff.

Theobald, *Q.C.*, in reply, referred, upon the question of the admissibility of extrinsic evidence, to *Attorney-General* v. *Drummond* (3), *Colpoys* v. *Colpoys* (4), and *Singleton* v. *Tomlinson*. (5)

Cur. adv. vult.

July 5. The following written judgments were delivered.

LORD ALVERSTONE M.R., after reading the material parts of the will, continued:—Stirling J. has held that the last clause of the will, commencing with the words "All the residue and remainder," is to be read by itself and construed as a bequest to the Canons of the sum of 13,187*l.* lent on mortgage, or so much of it as remained at the testator's death in 1898, after payment only of the testator's debts, funeral expenses, and the expense of proving the will; and that there is no connection between this clause and the preceding part of the will, or, in other words, that the legacies were to be paid, not out of the 13,187*l.*, but out of any general residue possessed by the testator at the time of his death. I am unable to adopt this view. I think that these words, as they stand in the will, form part of and must be read in connection with the preceding list of legacies, and that the words "All the residue and remainder" are at least open to the construction that the testator intended

(1) (1859) 7 H. L. C. 689, 700, 705.
(2) (1857) 3 K. & J. 198.
(3) (1842) 1 D. & War. 353, 367 et seq.
(4) (1822) Jac. 451.
(5) (1878) 3 App. Cas. 404, 425.

them to refer to what would be left of the sum of 13,187*l.*, which he clearly had in his mind after payment of the legacies and satisfying the annuity of 60*l.* given to his housekeeper; and I think the words "after payment of my just debts and funeral expenses" are not intended to define the mode in which all the residue and remainder of the sum of 13,187*l.* is to be arrived at, but are intended to indicate that this residue and remainder, after payment of the legacies, might still be reduced by the payment of his debts.

This seems to me the natural meaning of the clause in the place in which it occurs in the will, especially when it is borne in mind that the previous direction as to payment of debts, which was in somewhat different words, were in the printed form upon which the testator wrote his will. It is to be noted that there is no general residuary bequest or anything on the face of the will to indicate that the testator possessed or thought he possessed any other property than that with which he was dealing; and, in my view, if the meaning of the clause is not that which I have indicated it is, it is at least ambiguous, and open to the construction which I have put upon it as well as to the construction which Stirling J. has placed upon it.

Under these circumstances I think the case is one in which, upon the authorities which are collected and discussed in Wigram on Extrinsic Evidence and Jarman on Wills, 4th ed. vol. i. pp. 422 et seq., we are entitled to know what was the position of the testator at the time he made his will—to put ourselves, as some of the cases have said, in the position of the testator when he was writing the will.

It is in my opinion established beyond reasonable doubt that he then possessed the plate and china, the freehold church, the sum of 13,187*l.* advanced on mortgage, and a small sum, 145*l.*, at his bank, and no other property. There is nothing to shew that he had expectations from his mother or any other source, and I think it would be wrong to assume that this will contemplates that the legacies and the sum sufficient to satisfy the annuity, which amount altogether to between 11,000*l.* and 12,000*l.*, should be paid out of any general residue. I think the language of the will shews that the testator intended to

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deal with all the property which he believed he possessed by dividing it up among the legatees, and I think the words "all the residue and remainder of the sum of 9187*l.* and of the sum of 4000*l.*" clearly indicate this intention.

It is to be noted that the clause does not come as a separate and independent clause following after the printed direction as to the payment of the debts. There is no separate gift of the residue. If the language was intended to have the meaning which Stirling J. has put upon it, the words "residue and remainder" are somewhat superfluous: one would have expected to find a gift of the 13,187*l.* after payment of the debts, &c. If this clause had stood alone, or was clearly separated from the other parts of the will, it would be more difficult to avoid the construction which Stirling J. has put upon it; but having regard to the language used and its position I think, as I have said, that if the clause is not to be read in the way I have indicated, it creates an ambiguity which makes it our duty to get what light we can as to the circumstances of the testator at the time he wrote his will.

For the above reasons, I think the judgment of Stirling J. was erroneous, and that we must construe this will as containing a bequest to the Canons of the residue only of the amounts lent on mortgage after payment of the legacies and debts, &c. The result will be that there is an intestacy as to any residue of the property, and the questions discussed on the other appeal do not arise. As I am differing from the opinions of my brothers Stirling J. and Rigby L.J., I cannot but feel a doubt whether I have arrived at a correct conclusion; but, having a very strong view as to the meaning of the language of the will, it is my duty to express it. I think the costs of this appeal should come out of the residue.

RIGBY L.J. The difference of view which exists in this case depends, I think, upon the construction of the words of the will, and not upon any difference of opinion as to the rules regulating the admission of parol evidence.

It has not been contended here, or indeed in any case since the publication in 1831 of the first edition of Sir James

Wigram's treatise on "The Rules of Law respecting the admission of Extrinsic Evidence in aid of the Interpretation of Wills," that if a will, upon the face of it and independently of extrinsic evidence, ought to bear a definite construction, that construction can be varied by evidence dehors the will. I take the publication of that treatise as the dividing point, not because I am aware of any case before that time in which the proposition hereby sought to be negatived was openly decided or even argued, but because the speedy and complete acceptance by the Bench and Bar of the authoritative nature of Sir James Wigram's treatise seems to render it unnecessary to investigate earlier authorities, except so far as they are recognised or commented on therein. The third edition, being the last revised by the learned author himself, was published in 1840; and without intending to throw any doubt upon the very careful fourth edition (published in 1858 because the third was out of print), which does not in any relevant respect differ from the third, it is to the third that I shall refer whenever I find it necessary to invoke the authority of the writer. The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd ed. pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise there probably were, and subsequently there possibly may have been, instances of the kind. All such instances, however, must be attributable to the result of an unconscious though illegitimate yielding to the almost necessary bias in favour of a particular intention indicated or suggested by extrinsic facts as distinguished from the explanatory effect of such facts on the words of the will

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under discussion. The danger of this bias is manifest, and has been frequently adverted to, as, for instance, by Lord Thurlow in *Fonnereau* v. *Poyntz* (1), and by Sir Thomas Plumer in *Colpoys* v. *Colpoys*. (2) The importance of it is well illustrated by the great pains taken by those learned judges, and by Lord Eldon in *Attorney-General* v. *Grote* (3), to make it clear that in the wills before them respectively there was a sufficient want of exactness in the description of the legacies bequeathed to justify the resort to parol evidence of the state of the property. In *Attorney-General* v. *Grote* (4) Lord Eldon insists upon the point which he frequently in one form or another adverted to (see, for instance, *Barksdale* v. *Gilliat* (5))—that individual belief ought not to govern the case: it must be judicial persuasion.

There are numerous cases in which counsel for the parties have ingeniously, though of course not admittedly, sought to gain the benefit of the bias above referred to, before establishing the right to resort to parol evidence, and I am afraid that the present case is not free from something of this sort. All the points above insisted upon are capable of considerable enlargement; but enough has been said to shew that the first question in this, as in every case where the construction of a written document is concerned, is whether the will or other document, upon the face of it, is or is not ambiguous, or, on the contrary, capable of a definite judicial construction. It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it.

The will in the present case, which is dated May 31, 1895, is, with the exception of some immaterial parts, throughout in the testator's handwriting. It commences with the appoint-

(1) (1785) 1 Bro. C. C. 472, 477, 478.
(2) Jac. 451, 455.
(3) Wigram, App. II. p. 200.
(4) Ibid. p. 201.
(5) (1818) 1 Swans. 562; 18 R. R. 139.

ment of an executor, and then follows a direction that all the testator's debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. From this would be implied a charge upon his real estate, in aid of his personalty, of all his debts, funeral and testamentary expenses, so far as they involved debts. [His Lordship then briefly enumerated the bequests of legacies, amounting in nominal value (including the annuity at an estimate) to nearly 12,000*l.*, and continued:—]

The important point to notice here is that there is not a syllable to shew that the legacies are demonstrative (as they would be if payable out of a special fund), or other than general legacies payable out of residuary personal estate, if any. Immediately thereafter comes the following bequest: [His Lordship then read the bequest of "All the residue and remainder of the" two mortgage debts, and continued:—]

I will deal first with the bequest last mentioned to the three Canons, independently of the bequest of legacies preceding it. It does not appear to be in itself open to any doubt whatsoever. It is a gift of the residue of two mortgage debts "after payment of my just debts and funeral expenses, and the expense of proving this my will." The mortgage debts are specific items of the personalty, and the payments directed to be made thereout are clearly defined and capable of being accurately ascertained. So far, therefore, as the bequest itself is concerned, the residue which is the subject of the gift is also capable of being and must ultimately be precisely and accurately ascertained, and the expression "residue and remainder" is therefore fully and exhaustively accounted for and explained. I do not see how a desire to give whatever remains of the mortgage debts, after paying thereout the testator's debts and funeral expenses and the expense of proving his will, could be better or more accurately expressed, or by words more capable of conveying that without any additional meaning. It was suggested that a gift of all the mortgage debts, after payment of the specified sum, would have been sufficient and would have left the interpretation free from doubt. But such a gift, though intelligible, would have been inaccurate. Nothing is

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intended to be given until the specified payments have been made. As the bequest is made out of specific sums, and only out of those sums, it is itself a specific bequest, uncertain indeed in amount during the testator's lifetime, but fully ascertainable after his death. The question, therefore, may be stated as follows—whether a direction to pay general legacies out of a specific fund can be inferred, not as a matter of surmise or conjecture, but as a matter of judicial interpretation, simply and solely because the gift of the legacies is followed by a gift of all the residue and remainder of the fund, where the words "residue and remainder" have from the context a plain and undoubted meaning not involving any reference to payment of the legacies, nothing whatever being judicially known as to the state of the property, and the inference involving an intestacy as to all the general residue, whatever it might happen to be. No authority to that or any like effect was cited to us. If there were any sound rule on which the inference could be drawn, it would extend to any general legacies given just before the specific bequest, whether great or small. A legacy of 10*l.*, for instance, would by inference be payable out of the specifically bequeathed fund though standing alone. No inference can therefore be drawn from the approach to equality of the total amount of the legacies and the presumptive amount of the specifically bequeathed fund. In the present case such a construction would have the effect of varying and pro tanto revoking the specific bequest by reading in effect the words "after payment of debts, &c.," as though they stood, "after payment of debts, legacies, &c." If this was what the testator intended, he ought to have so provided; and it would have been natural that he should do so when a single word would have been sufficient. If nothing had been known as to the amount of residue, I venture to think that such a construction never would have been contended for. *Greville* v. *Browne* (1) and other cases governed by the same principle were indeed referred to as supporting the contention that the general legacies are payable out of the mortgage moneys because given earlier in the will. But the differences between those and the

(1) 7 H. L. C. 689.

present case are fundamental. First of all, the residuary gift of real estate there relied upon was not described in such a way as to limit its effect, but was a general gift. Then it was there (and this is the important point) a mixed residue of real and personal estate. Further, the charge on the real estate in no way depended on the position in the will of the legacies. That charge on the real estate would have been operative if the gift of legacies had followed instead of preceding the residuary devise. This results from the case of *Elliott* v. *Dearsley* (1), decided by Fry J., and confirmed on appeal by James, Cotton, and Lush L.JJ. Fry J. quotes (2) the Lord Chancellor's enunciation of the principle in *Greville* v. *Browne* (3): "For nearly a century and a half this rule has been laid down, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." Fry J. then proceeds as follows: "In other words, the rule seems to be this, that that which in its nature is a charge on part has become a charge or a deduction from the entire mass, and that principle appears to apply whether the legacies are given before or after the gift of the residue." James L.J. said (4): "Here the legacies"—which were given after the residuary devise—"are no doubt charged on the real estate by force of the word 'residue'"; and the other Lords Justices concurred. It is plain from this decision that the expression in Lord Campbell's judgment referring to the *prior* gift of the legacies and the *subsequent* making of the residuary devise and bequest, and any similar expressions in other judgments, are to be treated as not being emphatic in the sense of defining the position of the bequests in the will, but only as referring to the actual facts of the particular case under discussion. I may say that there are several independent points in the report which I have not taken notice of.

(1) (1880) 16 Ch. D. 322, 329.
(2) 16 Ch. D. 326.
(3) 7 H. L. C. 689.
(4) 16 Ch. D. 329.

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In this way the only authorities plausibly referred to as justifying the construction contended for disappear, and there seems to me to be no ground left for that construction. But if, notwithstanding all that has been said, the construction contended for could be supported, it would result that it should be arrived at on the construction of the will itself, and there would be no ambiguity or doubt making necessary the resort to extrinsic evidence of the amount of personal property at the date of the will. Whether this would be allowable in any case on a will in the terms of that before us in the present case seems more than doubtful. Sir James Wigram, than whom no greater authority has been called to our attention, says (Wigram, 3rd ed. pl. 103, p. 80): "In practice, an opportunity will generally offer of objecting to the admission of evidence, the materiality of which is questionable . . . . and upon the discussion to which the objection will give rise, the materiality of the evidence will be considered and determined . . . . If, however, the facts tendered be such that they cannot, from their nature, be material, the Court will at once reject them. Therefore, evidence of the amount of a testator's personal estate, at the time of making his will, ... is, in general, inadmissible." The reason is obvious. The will quoad the personal estate speaks from the death of the testator, and consequently its amount at the time of the making of the will, although it might bias the judgment, could not in general form a just ground of inference as to the meaning of the testator's words. Such evidence, however, may, *under special circumstances*, be material, and then it will be admissible.

The cases referred to as authorities for the departure from the generality of the rule laid down in this placitum are those already referred to of *Barksdale* v. *Gilliat* (1), *Fonnereau* v. *Poyntz* (2), and *Colpoys* v. *Colpoys* (3); to which might be added *Attorney-General* v. *Grote* (4) and *Druce* v. *Denison*. (5) *Fonnereau* v. *Poyntz* (2), *Colpoys* v. *Colpoys* (3), and *Attorney-General* v. *Grote* (4) were all cases of bequests, ultimately held

(1) 1 Swans. 562; 18 R. R. 139.
(2) 1 Bro. C. C. 472.
(3) Jac. 451.
(4) Wigram, App. II. p. 200.
(5) (1801) 6 Ves. 385.

to be ambiguous, concerning long annuities. The case of *Fonnereau* v. *Poyntz* (1) is carefully explained by Lord Eldon in *Druce* v. *Denison* (2) in the following words (3): "Upon what ground then did he admit the evidence? As I have always understood, and now understand it from this report, upon this ground; that the testatrix having given, as a species of stock, that, which was of no known denomination of stock, the will shewed, she meant to give something, but did not ascertain the subject she meant to give. Therefore Lord Thurlow looked at the property, in order to prove, what she meant; the will proving, that she meant to give something; but the description of the subject not being intelligible. That was not contradicting any description in the will. It was not saying, that was the personal estate of the testatrix, which was not her personal estate; but, that she meant by these words what she might be taken to mean; because upon the words, attending to the different species of stock, at the bank, it could not be ascertained, what species she did mean: it being clear, that she meant some." This explanation would extend, with only formal variations, to *Colpoys* v. *Colpoys* (4) and to *Attorney-General* v. *Grote*. (5) The last-mentioned case was confessedly a most difficult one, and Lord Eldon admits that with reference to it he had from time to time changed his opinion. Sir William Grant, who decided it as a judge of first instance, came to a judicial decision, though with great doubt, on the will itself different from Lord Eldon's ultimate conclusion (6), and of course he paid no attention to the parol evidence as to the state of the property. *Barksdale* v. *Gilliat* (7) and *Druce* v. *Denison* (2) were decided by Lord Eldon on the ground that the testator himself in each case had, by a writing either already accepted as testamentary or capable of being admitted to probate, made references, plainly intended to be explanatory of the will, to the state of his property; and in *Attorney-General* v. *Grote* (5) there was something of the same

(1) 1 Bro. C. C. 472.
(2) 6 Ves. 385.
(3) Ibid. 401-2.
(4) Jac. 451.
(5) Wigram, App. II. p. 200.
(6) (1817) 3 Mer. 316; 34 R. R. 183.
(7) 1 Swans. 562; 18 R. R. 139.

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kind on which Lord Eldon relied, namely, the codicil (1), wherein the testatrix recites that she may have made a wrong calculation of the value of her fortune in the funds, shewing thereby that it was with reference to the actual state of her property that her bequests were made. In all these exceptional cases, therefore, there were special circumstances, wholly wanting here, to justify the acceptance of extrinsic evidence as to the state of the property at the date of the will. It would not, however, be necessary to resort to this doctrine if, as appears to me to be the fact, there is really no doubt as to the construction of the will itself.

To sum up, the conclusion appears to me to be that Stirling J. was fully justified in the decision at which he arrived on the point here dealt with, and the principal appeal ought, in my opinion, to be dismissed.

If in fact the conclusion should be contrary to the intention of the testator, the defeat of that intention would seem to be the logical result of the statutory rule, that the will—meaning the whole will—must be in writing.

COLLINS L.J. I have come to the same conclusion as the Master of the Rolls in this case, though I need not say it is with the utmost diffidence that I find myself constrained to differ on a point of this kind from Stirling J. and my brother Rigby. There is, however, as it seems to me, no principle of law and no rule specially applicable to the construction of wills in question between us. It is merely a question of what is the fair grammatical meaning of an English sentence when read in its context. Read by itself, cut off from its context, it is, I agree, capable of one meaning only. When read in its place in the will, it seems to me, as a matter of mere grammar and common sense, to be quite as capable of another meaning; and taking the whole will together, what it says and what it omits, even without the assistance of extrinsic evidence, I prefer the latter. I do not dispute, therefore, any of the conclusions and observations made on the footing that the words of the will are clear and unambiguous.

(1) 3 Mer. 318.

I will now address myself to the will itself. [His Lordship then read it, and continued:—] There is no residuary gift. Now, taking the document as a whole, I should have thought it quite clear, but for the fact that my brothers Rigby and Stirling take a different view, that the sentence was grammatically capable of meaning "All that is left of the two mortgage debts at the point I have now reached in my will shall go, after you have paid my debts, &c., out of it, to A. and B." In other words, the expression "All the residue and remainder" of the two mortgage debts, coming as it does at the beginning of the sentence, is to my mind primâ facie suggestive of a previous deduction from the sums named, which constitute what he is dealing with as residue before he goes on to further diminish them by the subtraction of debts. This suggests, on the face of the will itself, a tacit assumption on the part of the testator that the only sum that he had available out of which to cover his legacies was these two mortgage debts, which he therefore treats, when he first mentions them, as already depleted by the deduction of legacies; and, so depleted, he deals with them by describing what is left of them as a residue which, when further diminished by payment of his debts out of it, is to be handed over to A. and B. The fact that he makes no other residuary gift suggests that he deems himself as having disposed of all that he had to give, and the will on its face accords with this construction, since without going outside it we have such a correspondence between the sums bequeathed and the funds available for their payment as to create a presumption that he intended these named funds, and no others, to cover his gifts. It is said that he has not in terms stated that the legacies as well as the debts are to be paid out of the mortgage funds; but that observation misconceives the suggested construction which asserts the prior deduction of the legacies as assumed in the word "residue," and therefore negatives the necessity of introducing the word "legacies" after "debts" in the sentence "after payment of my debts."

That as a matter of grammar the words "All the residue and remainder" of the mortgage debts are capable of this meaning can, I think, be demonstrated. Test it in this way.

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Suppose the testator had begun the will by saying, "All the property that I have to dispose of consists of certain freehold land and certain mortgage debts amounting to 4000*l.*," and had then proceeded to devise the freehold and bequeath the legacies, and then gone on as in the will, "All the residue and remainder," &c., could it be doubted that the words "residue and remainder" might in strict grammar be construed to mean the residue made by the deduction of legacies? So likewise if the words "after payment of my debts," &c., were left out and the will were left in other respects as it is, could it be contended that there was any grammatical objection to construing "residue and remainder" as meaning that portion of the mortgage debts which remained after the payment of legacies? But it is obvious that the addition of the recital in the one case and the omission of the clause about debts in the other do not alter the grammatical capabilities of the words in the collocation in which they stand. In the first case the recital helps the inference in favour of one of two possible grammatical constructions. In the second case the omission, by eliminating that which creates the ambiguity, makes one construction only possible, but together or separately they shew that the words in question are capable of the construction which I put upon them. A still simpler test would be to inclose the words "after payment of my just debts," &c., in a parenthesis. I have said that, taking the whole of the will and the evidence upon its face together, I think the construction I contend for, being quite as sound grammar as that which has been put upon it by Stirling J., is more in accordance with the intention to be gathered from the context and the scheme of the will as disclosed upon its face; but if I am allowed to assist my judgment by the fact proved before Stirling J.—that, with the exception of a small current balance at his banker's, the testator had at the time of his will no other property except that which he purports to dispose of in his will—what was probable before becomes a practical certainty, unless, as Mr. Theobald puts it, we are to consider that the testator was perpetrating a grim joke at the expense of the friends and dependents named as the objects of his bounty. Stirling J.

seems to have been of opinion that had the two constructions been possible so as to create a doubt as to which was meant, it would have been legitimate to admit evidence as to the state of the testator's assets at the time of the will. For the reasons I have given I think the construction is at least ambiguous, and I think such evidence is admissible. The maxim that in construing a written document surrounding circumstances may be looked at has been nowhere more emphatically laid down than in relation to wills. "Every claimant under a will," says Sir J. Wigram (pl. 96), "has a right to require that a court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare," citing *Doe* v. *Martin*. (1) And though I am aware that qualifications sometimes subtle and difficult of general application have been placed on this proposition, still I think the evidence here suggested falls within the words of Bayley J. in *Smith* v. *Doe* (2), referred to with approval by Sir Thomas Plumer M.R. in *Colpoys* v. *Colpoys*. (3) Bayley J. says: "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one: and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression." In *Colpoys* v. *Colpoys* (3) Sir Thomas Plumer, in dealing with the general rule excluding evidence of a patent ambiguity and the exception to that rule, sums up the situation by saying (4): "As a minor evil, therefore, common sense, and the law of England (which are seldom at variance), warrant the

(1) (1833) 1 Nev. & M. 512, 524.
(2) (1821) 2 Brod. & B. 473, 553.
(3) Jac. 451, 465.
(4) Ibid. 464.

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departure from the general rule, and call in the light of extrinsic evidence."

Common sense would certainly seem to demand that, given a real ambiguity, which in my judgment exists here, we should not decide it without availing ourselves of the means at hand of putting ourselves in the position of the testator at the time of the will. But the relation of parol evidence to the construction of written documents is not confined to wills, and the rules regulating it are of general application. The case of *Heffield* v. *Meadows* (1), decided with reference to a guarantee and having the great authority of the late Sir James Shaw Willes as well as that of Montague Smith J., seems to cover the present case. There the question arose upon a guarantee in the following terms: "I John Meadows . . . . will be answerable for 50*l.* sterling that William York of Stamford, butcher, may buy of Mr. John Heffield of Donington"; and evidence of the circumstances under which the guarantee was given was admitted in order to determine whether it was to be construed as continuing or as limited to a single transaction. "It is obvious," says Willes J. (2), "that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done that, it will be proper to turn to the language of the guarantee, to see if that language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties." I think the appeal should be allowed.

G. I. F. C.

July 12. By the leave of the Court the appeal of the next of kin and the pecuniary legatee was restored to the paper for

(1) (1869) L. R. 4 C. P. 595. (2) L. R. 4 C. P. 599.

further argument upon the question whether the Canons were entitled to throw upon the testator's personalty not disposed of by his will any part of the pecuniary legacies satisfied out of the mortgage debts bequeathed to them.

Jenkins, Q.C., and *W. M. Cann*, for the defendants the Canons. The Court has construed the will as giving the mortgage debts to the Canons after the payment of debts and legacies.

It is submitted that, as between the Canons and the next of kin of the testator, the legacies (including the annuity) must be paid out of the personalty which is not disposed of. When a specific fund is appropriated by a testator for the payment of debts and legacies, all those who claim under the will must take subject to that provision. But this exoneration of the general personal estate does not operate in favour of persons who do not take under the will, e.g., next of kin: *Holford* v. *Wood* (1); *Howse* v. *Chapman* (2); *Hewett* v. *Snare* (3); *Newbegin* v. *Bell* (4); *Choat* v. *Yeats*. (5) The legacies should be paid first out of the undisposed of personalty, and, if that is not sufficient, recourse should then be had to the mortgage debts.

Theobald, Q.C., and *J. Fischer Williams*, for the defendants the next of kin. When there is a residuary gift the specific fund appropriated for the payment of debts and legacies is the primary fund. And if the residuary fails, inasmuch as the oneration was for the purposes of the dispositions of the will, when those purposes fail the oneration fails also: *Kilford* v. *Blaney*. (6) A particular fund is charged with the debts and legacies, and there is no disposition of the residue. The oneration can only be for the benefit of the next of kin, to whom the testator has allowed the residue to go: *Milnes* v. *Slater* (7); *Dacre* v. *Patrickson*. (8) There cannot be any logical distinction between real estate and personal estate undisposed of by a

(1) (1798) 4 Ves. 76.
(2) (1799) 4 Ves. 542; 4 R. R. 292.
(3) (1847) 1 De G. & Sm. 333.
(4) (1857) 23 Beav. 386.
(5) (1819) 1 Jac. & W. 102; 20 R. R. 239.
(6) (1885) 31 Ch. D. 56, 63.
(7) (1803) 8 Ves. 295; 7 R. R. 48.
(8) (1860) 1 Dr. & Sm. 186.

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will. There is no reason why the Court should not follow the logical rule. *Howse* v. *Chapman* (1) is distinguishable. In *Hewett* v. *Snare* (2) no general rule was laid down. The point which was decided in *Newbegin* v. *Bell* (3) does not really arise in the present case, for the gift to the Canons is only of what is left of the mortgage debts after payment of the testator's debts and legacies. It is a specific gift to them of what is left of the mortgage debts after paying thereout the testator's debts and legacies. If the testator had in his lifetime got in the mortgage debts, and had spent the money, the legacies would have been adeemed.

Ingpen, Q.C., for the plaintiff.

Jenkins, Q.C., in reply.

Cur. adv. vult.

Aug. 3. RIGBY L.J. read the judgment of the Court (Lord Alverstone M.R., Rigby and Collins L.JJ.). The order of the Court treats the words "all the residue and remainder" in the bequest to the Canons as indicating that the pecuniary legacies preceding are to be paid out of the mortgage debts before the Canons take anything. It has not yet been in terms decided whether the legacies are specific or demonstrative. Since, however, the construction adopted treats the testator as directing, in the case of each legacy, the payment of money (the amount or value of the legacy) out of money (the mortgage debts), the legacies should be deemed to be specific. The result would be that they would be subject to abatement or ademption to the extent, if any, that the amount of the mortgage debts remaining unpaid might turn out insufficient to provide for them in full, but would even in that case have no other fund to resort to.

It has been formally admitted on the part of the next of kin that, if there were any debts paid out of that portion of the specific assets which would otherwise have gone to the Canons, the latter would be entitled to be recouped the amount paid out of the personalty undisposed of, and we have not to deal with that question.

(1) 4 Ves. 542; 4 R. R. 292. (2) 1 De G. & Sm. 333.
(3) 23 Beav. 386.

But it is contended that the Canons are entitled to throw upon the undisposed of personalty any part of the legacies satisfied out of the mortgage debts. There is no foundation for this claim. It has been attempted to support it by cases in which there has been a charge upon, or a trust to sell real estate or specific personal estate for payment of debts or legacies under circumstances which make the charge or trust auxiliary only to the general personal estate treated as the primary fund. This can certainly be done in general where debts are concerned, and under very special directions where legacies are concerned. But none of such cases properly interpreted have any application here. Assume for instance that the money value of the legacies amounts to four-fifths of the mortgage debts, then four-fifths are given to the legatees. There will be one-fifth, and no more in any case, to go, after payment thereout of debts, to the Canons. By what process of reasoning they can convert a legacy of one-fifth only into a larger legacy for any purpose of recoupment, or any other purpose, it is impossible to say. The existence of undisposed of personalty is altogether insufficient, and indeed irrelevant. It is possible that the testator might have given them more, if he had had fewer legacies to provide for, but he has not done so.

The application of the Canons must be dismissed, and they must pay the costs of this application.

Solicitors: *Collyer & Davis; Withalls & Belton; Blount, Lynch & Petre.*

W. L. C.

STIRLING J.

1899

Dec. 20.

1900

May 22, 29, 31.

In re RICHARDSON. RICHARDSON *v.* RICHARDSON.

[1899 R. 777.]

In re RICHARDSON. RICHARDSON *v.* RICHARDSON.

[1900 R. 466.]

Settled Land—Tenant for Life—Person having Powers of Tenant for Life—Tenant for Life subject to Term for securing Incumbrances—Possession—Title-deeds—Custody—Sale—Application of Capital Moneys—Discharge of Incumbrances—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 53.

Land which was subject to mortgages was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A. for life, with remainders over. The trusts of the term provided that so long as the mortgages remained unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest of the mortgage debts and certain rent-charges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of 600*l.* a year, and should apply the residue of the rents and profits towards the payment of the principal moneys charged by the mortgages, and there was a proviso for the cesser of the term upon the discharge of the mortgage debts. The settlement conferred on the trustees an immediate power of sale and exchange, but no power of leasing:—

The Court, having held that A. was a person having the powers of a tenant for life under the Settled Land Act, 1882, ordered him to be let into possession upon his undertaking to perform the trusts of the term, and gave him the custody of the title-deeds.

The Court would have made the order apart from the annuity to A.

A. subsequently contracted to sell, under the powers of the Settled Land Acts, certain portions of the settled lands, including parts of all the mortgaged lands and a portion which was unincumbered, and in order to complete the sale it was necessary that the mortgages should be paid off. A. therefore directed that the trustees should apply the proceeds of the sale in paying off the mortgages. He deposed that he considered that this would be for the benefit of all the parties entitled under the settlement, seeing that the mortgages bore interest at 4 per cent., whereas the purchase-money could not be invested in trustee securities to yield more than 3 per cent. Upon a summons to determine whether the mortgages ought not to be kept on foot for the benefit of the ultimate remainderman:—

Held, that the beneficiaries under the settlement took subject to the

power of sale conferred on the trustees, and that inasmuch as the trustees in the exercise of that power might properly, for the purpose of carrying into effect a beneficial sale, pay off the existing incumbrances out of the purchase-money, a tenant for life doing the same thing under the powers of the Settled Land Acts ought not to be held to be acting unjustly towards the remaindermen; that consequently the mortgages ought not to be kept on foot, and that upon the payment off out of the capital moneys of all the mortgages the term would cease.

Semble, the Court would have arrived at the same conclusion if the settlement had conferred no power of sale upon the trustees. (1)

ORIGINATING SUMMONS under the Settled Land Acts, 1882–1890.

By a settlement dated September 24, 1879, it was recited that Ralph Richardson the elder, the settlor, was absolutely entitled to an estate in fee simple of the lands thereinafter expressed to be thereby granted, subject to certain mortgage debts affecting the same, and that in consideration of the natural love and affection which he had towards Ralph Richardson, his son, he agreed to make a settlement. The settlor then conveyed the lands in question, subject to the mortgages affecting the same, to the use of himself for life, and after his decease to the use that his wife should receive during her life a yearly rent-charge of 1000*l.*, and after her death to the use and intent that his four daughters therein named, and the survivors and survivor of them, should receive during their joint lives, and the lives of the survivors and survivor of them, a yearly rent-charge of 400*l.*; and power was reserved to the settlor to charge the said premises with payment to himself of a sum not exceeding 4000*l.* and interest at 5 per cent., and for that purpose to revoke the uses of the settlement; and subject as thereinbefore mentioned, the lands were limited to the use of the trustees for the term of 1000 years from the death of the settlor upon the trusts thereinafter declared concerning the same; and after the determination of the said term, and in the meantime subject thereto, to the use of Ralph Richardson the younger for life, with remainder to the use of his first and other sons in tail male, with remainder to John Billingsley Richardson for life, with remainder to his

(1) See *In re Money Kyrle's Settlement*, post, p. 839.

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first and other sons in tail male, with remainders over in like manner to two other sons of the settlor and their sons in tail male, with an ultimate remainder to the settlor in fee. And the settlement conferred upon the settlor during his life and after his decease "after satisfaction of the trusts of the said term of 1000 years but not during the continuance of those trusts" upon every person thereby made tenant for life of the said premises a power of leasing for any period not exceeding twenty-one years; and the settlement also conferred upon the trustees during the life of the settlor, with his consent in writing, and during the life of any person thereby made tenant for life who should be entitled, or but for the trusts of the term of 1000 years would be entitled, to the possession or the receipt of the rents and profits of the same premises, with the consent of such person, a power of sale and exchange. And the trusts of the said term of 1000 years were declared to be as follows: "that so long as the said term shall continue and any mortgage debt charge or incumbrance now subsisting or which shall be created under the power for that purpose hereinbefore vested in the said Ralph Richardson the elder or any part thereof respectively or any interest for the same or any of them or any part thereof respectively shall remain unpaid" the trustees "shall receive the rents and profits of the same premises and shall manage or superintend the management of the same premises" with consequential powers, including the power to cut timber and underwood, "and shall during the continuance of the said term and out of the rents and profits of the same premises (including the produce of the sale of timber and underwood) pay and discharge the expenses incurred in or about such management or in the exercise of any of the powers aforesaid or otherwise in respect of the premises and all outgoings which they or he shall think fit to pay and keep down the interest of any principal sum or sums of money which may be charged by way of mortgage or otherwise upon the same premises or any part thereof and such of the said rent-charges of 1000*l.* and 400*l.* as may be for the time being payable in respect of the same premises and in the next place shall pay to the person who for the time being shall be tenant for life of

the premises hereinbefore expressed to be granted or who but for the trusts of the said term of 1000 years would have been entitled to the receipt of the rents and profits of the same premises the annual sum of 600*l.* free from deduction and shall apply the residue of the said rents and profits in or towards the discharge of all or any principal sum or sums of money which may be charged by way of mortgage or otherwise upon the same premises or any part thereof and to which principal sums the grant hereinbefore expressed to be hereby made is expressed to be made subject."

And the settlement contained a proviso for the cesser of the term as follows: "Provided always that when and as soon as all principal sums of money which may be charged by way of mortgage or otherwise on the premises hereinbefore expressed to be hereby granted or any part thereof shall have been fully discharged then and immediately thereupon and thenceforth the said term of 1000 years shall" (subject to the right of trustees to be reimbursed all costs and expenses in relation to the trusts aforesaid) "be deemed to be a satisfied term." The settlement did not confer any leasing powers upon the trustees.

At the date of these proceedings Ralph Richardson the elder and his wife were both dead; consequently, the rent-charge of 1000*l.* was not subsisting, but the charge of 400*l.* in favour of the daughters was still in force, and the mortgages on the settled property had not been paid off. There was also a sum due under a charge created by the settlor during his lifetime in favour of himself under the power contained in the settlement. Ralph Richardson the younger had also died without issue; and J. B. Richardson was the first tenant for life under the settlement, subject to the term.

This summons was taken out by J. B. Richardson under the Settled Land Acts, 1882–1890, for a declaration—(1.) that the applicant was a tenant for life, or a person having the powers of a tenant for life, under the Settled Land Acts in respect of the lands in question; (2.) that the proceeds of sale of any land sold by the applicant under his statutory powers might be applied in paying off the incumbrances upon the

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lands remaining unsold; (3.) that the applicant ought to be let into immediate possession of the settled lands, and that the title-deeds ought to be delivered up to him.

There being at this time no actual proposal for a sale before the Court, Stirling J. declined to deal exhaustively with the summons, but upon the two first questions he held that the applicant was a person having the powers of a tenant for life under the Settled Land Acts, and that he was not precluded by the existence of the term from exercising those powers. The third question was then argued.

Upjohn, Q.C., and *E. Ford*, for J. B. Richardson. The applicant is in substance the tenant for life under the settlement, and ought therefore to be let into possession and have the custody of the title-deeds. It is his interest to increase the balance, after keeping down the interest on the mortgages, as much as possible. Moreover, the Settled Land Act confers upon him leasing powers which cannot be conveniently exercised unless he is in possession; and it is to be observed that the trustees have no leasing powers under the settlement. Since the passing of the Settled Land Act, 1882, the practice of the Court as to granting possession and as to the custody of the title-deeds has changed in favour of the tenant for life under the settlement: *In re Wythes* (1); *In re Bagot's Settlement* (2); *In re Newen* (3); *In re Burnaby's Settled Estates.* (4)

Jenkins, Q.C., and *Younger*, for a person representing the ultimate remainderman. There is no authority for the exercise of the jurisdiction of the Court where the applicant is not the person beneficially entitled to possession under s. 2 of the Settled Land Act. It has never been exercised where the tenant for life is not entitled to receive the rents and profits. Here the trustees have not an estate supporting the tenant for life, but an overriding estate; and to let the applicant into possession would be an undue interference with the trusts of the settlement. The old authorities proceeded upon the footing of giving to the equitable estate of the tenant for life the effect

(1) [1893] 2 Ch. 369.
(2) [1894] 1 Ch. 177.
(3) [1894] 2 Ch. 297.
(4) (1889) 42 Ch. D. 621.

of the legal estate, and we submit that there is no authority for allowing a tenant not beneficially entitled to possession to execute the trusts vested in the trustees.

R. J. Parker, for two of the trustees of the settlement, argued to the same effect.

C. P. Sanger, for the remaining trustee, supported the application.

Upjohn, Q.C., in reply.

STIRLING J. The point which I have now to determine is whether the applicant, J. B. Richardson, ought to be let into possession of the settled estates. [His Lordship referred to the settlement, and observed that under the trusts of the term the applicant was entitled to an annuity of 600*l.* a year, and he continued as follows:—]

The applicant has the powers of a tenant for life under the Settled Land Acts; he can, therefore, let, and it is to be observed that the trustees have not a power of granting leases. They have a power of sale, but the provisions of the Settled Land Acts as regards sales would still be applicable. Now unquestionably, apart from the Settled Land Acts, the Court has a discretion to direct trustees to give up possession to the tenant for life, and I apprehend that that power may be exercised in favour of a tenant for life who is not a cestui que trust, but whose estate is subject to a term for securing incumbrances; for in *Tidd* v. *Lister* (1) Sir John Leach, referring to the case of *Blake* v. *Bunbury* (2), says: "It was not the case of a cestui que trust for life, but the case of a legal tenant for life, subject to a term for raising a charge. There was there no purpose but to raise the charge, and the legal tenant for life, securing the charge, had upon every principle a right to the possession." So that there, notwithstanding the existence of a term securing a charge, a tenant for life was let into possession. The Vice-Chancellor then goes on: "There may be cases in which it may be plain from the expressions in the will, that the testator did not intend that the property should remain

(1) (1820) 5 Madd. 429, 432; 21 R. R. 323.

(2) (1790) 1 Ves. Jr. 194; 1 R. R. 111.

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under the personal management of the trustees.—There may be cases in which it may be plain from the nature of the property, that the testator could not mean to exclude the cestui que trust for life, from the personal possession of the property, as in the case of a family residence.—There may be very special cases in which this Court would deliver the possession of the property to the cestui que trust for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the cestui que trust, there the Court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator." And then he distinguishes those cases from the case before him. The question was again dealt with by the late Master of the Rolls, Sir George Jessel, in *Taylor* v. *Taylor*. (1) There the Master of the Rolls, having expressed his opinion that upon the words of the will the testator intended the trustees to have the management of the estate, said: "Then it is said, and truly said, that there are certain cases in which, although similar words have occurred in wills, the Court of Chancery has thought fit to put the tenant for life in possession. I agree, but I say that it is subject to the judicial discretion of the Court. It is not the right of the tenant for life to be in possession. The tenant for life is not entitled to the possession, but the Court has a power, notwithstanding similar expressions in a will, to say that, looking to the whole will, the intent can be fully accomplished by putting the tenant for life in possession, taking security from the tenant for life either in the shape of an undertaking (if that should be thought sufficient), or, in some instances, other substantial security, that what remains to be done under the will for the benefit of persons other than the tenant for life, shall be duly performed." That is how the law stood before the passing of the Settled Land Act, 1882; but since the passing of that Act the Court has exercised the discretion which it had before much more freely. Chitty J., in *In re Bagot's Settlement* (2), puts it thus:

(1) (1875) L. R. 20 Eq. 297, 303. (2) [1894] 1 Ch. 177, 182.

"I am not disposed myself to say that the Settled Land Acts have abrogated the old cases. It really appears to me that the proper expression with regard to the Settled Land Acts with reference to the doctrine which I am considering is, that the Settled Land Acts afford an additional ground for exercising the discretion favourably to the person who has conferred upon her or him, as tenant for life, by the Settled Land Acts, the extensive powers therein contained—powers which are expressly conferred upon a married woman though she is restrained from anticipation." That appears to me to be a stronger case than the case before me. In my opinion, the question in every case is one for the exercise of the discretion of the Court. I have here a tenant for life subject to a term; and he can grant leases though the trustees cannot. That is a right which the Legislature has given him and of which he cannot be deprived. Further it is a power which it is very difficult for him to exercise properly without being in possession. What is there against it? It is said that he is not a cestui que trust under the term; he is, in point of fact, though he only gets a limited benefit under the term. He only gets an annuity of 600*l.* a year, but he gets it in the capacity of tenant for life. But I do not rest the case upon that, because the old authorities shew that the Court has a wider discretion. Looking at the manner in which this discretion has been exercised since the Settled Land Act, 1882, I think that the most beneficial way in which this property can be dealt with is by letting the applicant into possession, upon his giving proper undertakings as to the performance of the trusts of the term.

With reference to the title-deeds, the case is stronger in favour of the applicant, because, in order to enable him to exercise properly the powers of leasing and sale vested in him by the Settled Land Acts, it is plain that he ought to have the title-deeds in his possession.

Subject to the points above decided, the Court ordered the summons to stand over.

Shortly after this decision J. B. Richardson entered into contracts for the sale of various portions of the settled property

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at prices amounting in the aggregate to 13,400*l.* At this date the settled property was subject to mortgages for 13,122*l.* 2*s.* 3*d.*, all bearing interest at 4 per cent., so that the proceeds of sale would be a little more than sufficient to pay off the mortgages in full. These mortgages were not all on the same portions of the property, but the portions contracted to be sold included parts of all the mortgaged estates, though they included also one estate which was not mortgaged, and in order to complete the sales it was necessary that all the mortgages should be paid off. Accordingly J. B. Richardson, acting under s. 21 (ii.) and s. 22, sub-s. 2, of the Settled Land Act, gave a direction to the trustees that the proceeds of sale should be applied in the discharge of these incumbrances.

The trustees were advised that the mortgages ought to be kept on foot for the benefit of the ultimate remainderman, and they suggested that J. B. Richardson should restore his summons for the purpose of determining this question. On his refusal to do so they took out an originating summons under the Settled Land Acts to have it determined whether, upon the true construction of the settlement and in the events which had happened, the mortgages on the settled estates, or any part or parts thereof, which might from time to time be paid off by the direction of the defendant J. B. Richardson out of capital moneys arising from the sale of parts of such settled estates ought to be transferred to the trustees of the term of 1000 years, or otherwise kept on foot, until, by the accumulation of rents and profits of the settled estates under the trusts of the term of 1000 years created by the said settlement, a sum should have been provided sufficient to discharge all the mortgages now existing on the said settled estates, and any part or parts thereof, or how otherwise, and whether after the payment off out of capital moneys of all the said mortgages the trusts of the said term would still continue.

J. B. Richardson filed an affidavit in opposition to this summons, in which, after stating that the total interest payable on the mortgages on the settled property at 4 per cent. amounted to 525*l.* a year, and that the proceeds of sale were sufficient to satisfy the mortgage debts, he continued as follows: "If the

said proceeds of sale amounting to 13,400*l.* were invested in trustees' securities, the interest produced thereby, taking it at 3 per cent. per annum would only amount to the sum of 400*l.* per annum or thereabouts, and it is, I believe, difficult to obtain interest at so high a rate for any considerable sum of money. . . . . Under the circumstances, therefore, although no doubt the income produced by the settled estate will be increased by paying off the mortgages upon such estate, and the successive tenants for life of the estate will in that manner receive some benefit, I have, acting in good faith, considered that it would be for the benefit of all parties interested in the settled estate that such mortgage debts should be paid off out of the said proceeds of sale, and I have, in giving directions to the trustees to apply the said proceeds of sale in paying off the said mortgage debts, had regard to the interests of all parties entitled under the settlement."

R. J. Parker, for the applicants, the trustees.

Upjohn, Q.C., and *E. Ford*, for J. B. Richardson. The sole question is whether the mortgages are in some way to be kept on foot. The trusts of the term only continue so long as the incumbrances exist. Under the Settled Land Act, 1882, the tenant for life has power to direct the trustees to apply the proceeds of sale in discharge of the incumbrances in the exercise of his power. The mere fact that he has a pecuniary interest in the subject-matter is no ground for saying that the exercise of his power is invalid. His exercise of the power can only be impeached on the ground of unfairness: Settled Land Act, 1882, ss. 21 (ii.), 22, and 53; *In re Duke of Marlborough's Settlement* (1); *Clarke* v. *Thornton* (2); *In re Lord Stamford's Settled Estates* (3); *In re Lord Coleridge's Settlement.* (4) It is not enough to prove that the tenant for life has a pecuniary interest, nor to prove that he has exercised his discretion in a manner which seems to be in favour of his pecuniary interest. It must be shewn that he has exercised it unfairly.

(1) (1885) 30 Ch. D. 127; (1886) 32 Ch. D. 1.
(2) (1887) 35 Ch. D. 307.
(3) (1889) 43 Ch. D. 84.
(4) [1895] 2 Ch. 704.

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The direction given to the trustees is valid and ought to be carried out.

Maugham (*Younger*, *Q.C.*, with him), for a person representing the ultimate remainderman. The direction to pay off the incumbrances was given by the tenant for life for his sole benefit, and without regard to that of any other person interested under the settlement.

Before the Settled Land Act, 1887, terminable incumbrances could not be discharged or redeemed under s. 21, sub-s. 2, of the Act of 1882, but they could be purchased, and must be kept alive so as to preserve the interests of all parties: *In re Knatchbull's Settled Estate.* (1) The Act of 1887 was passed to get over the difficulty caused by that case. If a purchase were directed, under s. 22, sub-s. 6, the income of the security would be applied under the trusts of the term, and the settlement would remain unaffected. If the tenant for life by taking one course will benefit the whole estate at the expense of no one, and by taking another course will give himself a benefit to the detriment of other parties interested, then he cannot take the latter course. The tenant for life in this case is controlled by s. 53: see also *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (2); *Hampden* v. *Earl of Buckinghamshire.* (3) The intention of the settlor ought not to be overridden by the tenant for life for his own benefit.

Upjohn, *Q.C.*, in reply.

Cur. adv. vult.

May 31. STIRLING J. (after stating the facts). No objection is taken to the sale. All objection to that has been expressly repudiated by the learned counsel who appear for the remainderman; but objection is taken to the direction as to the application of the proceeds of sale. It is argued that the mortgages ought to be kept on foot so that the trusts of the term may continue in force, and the surplus of the rents and profits, after keeping down the existing annuities of 400*l.* and 600*l.* a year, accumulated for the benefit of the ultimate remainderman.

(1) (1885) 29 Ch. D. 588. (2) [1893] 3 Ch. 169. (3) [1893] 2 Ch. 531,

Now, in the first place, the direction given by the defendant J. B. Richardson is within the plain terms of the Settled Land Act, 1882, s. 21 (ii.); but it is said that s. 53 places the tenant for life in a fiduciary position, and that he is bound by the terms of the Act in exercising any powers vested in him to have regard to the interests of all parties under the settlement, and is to be deemed to be in the position, and have the duties and liabilities, of a trustee for those parties. It is said that the result of what is proposed by the tenant for life will be to deprive the remainderman of all future accumulations, which, if the tenancies for life should exist for a sufficient period, would amount to over 13,000*l.* odd, the principal of the mortgages, and that consequently the remainderman on coming into possession will find a property which is less valuable by 13,000*l.* odd; and it is contended that, if the direction is carried out simply as it now stands, sufficient regard will not have been paid by the tenant for life to the interests of the remainderman, and that the Court ought to control the exercise of the discretion vested in the tenant for life. I call him a tenant for life, although he is not really a tenant for life, but only in the position of a person having the powers of a tenant for life.

There is no question that the Court has in certain cases exercised control over the tenant for life. One case much relied on on behalf of the remainderman is the case of *In re Knatchbull's Settled Estate.* (1) There the tenant for life had, prior to the Settled Land Act, 1882, created charges for land drainage improvements under the Improvement of Land Act, 1864, and these were repayable by instalments. In that case it was held that he was not entitled under the Settled Land Act, s. 21, sub-s. 2, to have these charges paid out of the capital of the settled estates so as to relieve him from the payment of the instalments. Part of the ground of that decision was that payment of the incumbrances in question did not fall within the terms of the section. Cotton L.J. in giving judgment (2) speaks of the nature of the charge, and he says: "It is not to be principal payable entirely out of corpus, and only interest out of rents and profits, but as between persons having a

(1) 29 Ch. D. 588. (2) 29 Ch. D. 591, 592, 593.

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limited interest, and the persons entitled to the absolute interest in the estate, the persons having a limited interest are to bear part of the principal as well as the interest accruing during their lifetime, and if those interests last long enough they will have to repay the whole money borrowed, both principal and interest. It is proposed that this should be entirely altered, and that the person having a limited interest who has borrowed money on the terms mentioned, should be relieved entirely from the payment of the principal, and should only bear the interest. Is that right? It is said that it is the effect of the Settled Land Act; and if "—this is an important observation—"the Settled Land Act had in terms said that this might be done, it would be our duty to carry into effect the terms of the Act. But that the Act did not generally intend to interfere with existing rights, as between tenant for life and those entitled in remainder, is to my mind clear from the 53rd section of the Act." Then he discusses s. 53, and he proceeds to consider the nature of the charges, and he says that "undoubtedly these are charges affecting the inheritance of the settled land, but not charges which in their nature are redeemable or capable of being discharged." There the Court came to the conclusion that they were not within the exact terms of the clause in the Settled Land Act which I have referred to. The Lord Justice concludes by saying this: "Independently of any other matter, I think that s. 53 shews that it would be contrary to the intention of the Legislature if we were to accede to the application which is made here to apply these moneys in the way proposed." Another case, and one in which the Court has gone the furthest in controlling the discretion of the tenant for life, is that of *Hampden* v. *Earl of Buckinghamshire*. (1) There there had been an order made for the sale of settled land which was heavily incumbered, but its operation was postponed for a time to give an opportunity of paying off the incumbrances. The tenant for life then proposed to mortgage the whole of the settled land, under the Settled Land Act, 1882, in order to pay off certain mortgages on a part of it, but the mortgage was not to pay off certain

(1) [1893] 2 Ch. 531.

annuities charged on the whole of the settled land; and it was objected that it would prejudice the interest of the annuitants. In dealing with the question Lindley L.J., who gave the judgment of the Court, said in the first place that that case was within the power, and then he proceeds thus (1): "It remains to consider whether the tenant for life can properly exercise this power, having regard to s. 53 of the Settled Land Act, 1882. Upon this point I felt considerable doubt until the evidence as to the value of the Buckinghamshire estates was furnished to the Court. But this evidence satisfies me that the proposed mortgage will be unjust to them; and that justice to them requires that no such mortgage shall be made—at least, until it has been ascertained that no sale at a proper price can be effected. It was forcibly contended by Sir Horace Davey that it was for the tenant for life, and not for this Court, to determine what ought to be done; and that, so long as the tenant for life was acting bonâ fide, the Court ought not properly to interfere with him. Speaking generally, I think this is true. But, assuming a tenant for life to be acting bonâ fide and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere." Therefore, the law as there laid down is that the tenant for life acting bonâ fide ought not to be interfered with unless the Court can see that, in spite of his honesty, he is acting injuriously towards those whose interests he is bound to protect. Now, here the tenant for life has sworn in terms that he has considered the interest of all parties, and that this is a proper direction to be made. The main ground upon which he seems to have acted appears to be that he considers it would not be a good business transaction to invest the purchase-money at 3 per cent. when it may be employed in paying off incumbrances bearing interest at the rate of 4 per cent. As a general proposition that is perfectly sound, as it seems to me; but I have to see, in the

(1) [1893] 2 Ch. 543.

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language of Lindley L.J., whether in what he is doing he is to be regarded as acting unjustly towards those whose interests he is bound to protect. In considering the interests of the parties under this settlement, it seems to me that I ought to attach great importance to the fact that there exists a power of sale which is exercisable during the continuance of the term of 1000 years. The trusts of the term are only to continue so long as the mortgages remain unpaid, and the proviso for cesser comes into operation when and so soon as all the principal sums charged by way of mortgage on the settled property have been fully discharged. The settlor has conferred on the trustees of the term a power of sale which is expressly made exercisable during the term, and it appears to me he must have contemplated that on such a sale the mortgages, or some of them, might be paid off, and that in this way the trusts of the term might be brought to an end, or at all events that the period for the cesser of the term might be accelerated. In other words, the various beneficiaries under the settlement take by virtue of it, subject to the exercise of this power of sale. If the trustees of that power were themselves exercising it, then it seems to me that for the purpose of carrying into effect a beneficial sale they might properly pay off the existing incumbrances out of the purchase-money—and, indeed, that would be the ordinary and natural course of proceeding—and with reference to that they might rightly take into consideration that those incumbrances carried interest at 4 per cent., while the investment of the purchase-money would not yield more than 3 per cent. Now, in this case no one complains of the sale. It is admitted that the sale is proper and beneficial in the interests of all parties. In order to carry it out it is necessary that the mortgages should be paid off. If the trustees in the exercise of their power of sale might properly pay them off out of the purchase-money—and it seems to me that they might—I do not see why I should come to the conclusion that the tenant for life doing the same thing is to be held to be acting unjustly towards those whose interests he is bound to protect.

I desire to rest my judgment on these grounds; but at the

same time, in order to prevent misapprehension, I do not wish it to be supposed that the same conclusion might not have been arrived at if there had been no power of sale in the settlement. In *Lord Henry Bruce* v. *Marquess of Ailesbury* (1), in the House of Lords, it was laid down that the paramount object of the Settled Land Act was the well-being of settled land, and it was there pointed out that one obstacle to such well-being consisted in the existence of incumbrances, since it places a tenant for life in such a position that he cannot properly keep up the estate. In my opinion, the Court would not readily interfere with a sale which, by the proper application of the purchase-money within the terms of the Act, might result in the removal of such an obstacle. I think, therefore, that the question put by the summons ought to be answered by saying that, in the events which have happened, the mortgages on the settled estates, which may be paid off by the direction of the defendant J. B. Richardson out of the purchase-moneys arising from the sale, ought not to be transferred to the trustees of the term of 1000 years or otherwise kept on foot, and that after the payment off out of capital moneys of all the mortgages the trusts of the term will not continue.

Solicitors: *Taylor, Stileman & Underwood, for A. W. Cowdell, Torquay; G. W. P. Mellor.*

(1) [1892] A. C. 356.

H. B. H.

STIRLING J.
1900
July 25, 26; *Aug.* 2.

GIBBON *v.* VESTRY OF THE PARISH OF PADDINGTON.

[1900 G. 812.]

Metropolis Management—Streets and Highways—Widening Street—Power to take Part of House—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

A vestry requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act may be compelled by the owner to take the whole as a condition of taking the part, if the removal of the part will substantially injure the enjoyment of the house in the manner in which it was formerly enjoyed.

So *held* on the authority of *Gordon* v. *Vestry of St. Mary Abbotts, Kensington*, [1894] 2 Q. B. 742.

Trial of Action.

This was an action for an injunction to restrain the defendants from proceeding under a notice to treat, dated October 25, 1899, to take such parts of four houses in Moscow Road, in the parish of Paddington, as were therein mentioned. The notice to treat was given under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.). It recited a resolution by the defendants to widen Moscow Road, and an adjudication by them that the hereditaments coloured red in the plan annexed to the notice "did obstruct and prevent the improvement for the widening of Moscow Road therein mentioned, and that the possession, occupation, and purchase of such hereditaments and premises would be necessary for effecting the said improvement," and stated that the defendants required to purchase the hereditaments in question, and were willing to treat with the plaintiff for the purchase of them, and as to the sum to be paid or compensation to be made to the plaintiff for any injury or damage that might affect the plaintiff, or be sustained by him by reason of the said improvement. The hereditaments referred to in the notice were the front portions of four adjacent houses belonging to the plaintiff, being Nos. 1, 2, 3 and 4, Moscow Road. The portions required by the defendants comprised the

whole of the front walls of the houses, together with a strip of the property about 4 feet in width. The houses were small and of considerable age. They extended some distance back from the road, having gardens or yards in the rear. The front portion of each house was used as a shop, and behind that there was a parlour, and behind that again there was another room. The shops ran to a depth of from 11 feet to 14 feet, so that approximately it was proposed to take between a third and a fourth of the existing shops. The houses were unlet. Three of them were in good structural repair, and could by a slight expenditure for the purpose of decorative repairs be made fit to be let and occupied in the manner in which they had hitherto been occupied as shops. The fourth house, No. 4, was not in such a good condition structurally owing to the fact that the plaintiff had recently rebuilt the adjacent house, No. 5, Moscow Road, which also belonged to him, and a considerable sum would be required to be expended in structural repairs to put it in order to be let. It appeared, however, from the evidence that No. 4 was still capable of being put into repair and used as a shop. It also appeared that prior to the notice to treat there had been some negotiations between the plaintiff and the defendants, and the plaintiff had proposed terms upon which he was willing to part with a portion only of the property; but the negotiations came to nothing, and ultimately the plaintiff fell back upon what he considered his strict right, and asked that the defendants, if they insisted upon taking the parts of the houses specified in the notice to treat, should take the whole.

C. E. Jenkins, *Q.C.*, and *F. H. Colt*, for the plaintiff. The effect of acting upon the defendants' notice to treat would be to deprive the plaintiff of the whole fronts of his houses to the depth of 4 or 5 feet. The defendants have no power to take a portion of a house under such circumstances as exist in the present case. They rely upon Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), ss. 80, 81, 82; but that Act does not give them any such power. In some sense, no doubt, a local authority can under this Act take a part of a house without taking the whole; but we submit it can only be done in a case where the

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house itself is substantially left to the owner. The power does not extend to taking such part as will materially alter the character of the house and prevent its being used and enjoyed as heretofore. In *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), which decided that a part of a house might be taken under some circumstances, the Court expressly laid down that this could only be done where it did not involve a substantial alteration of the character and condition of the house. That statement of the law fully covers this case, and the plaintiff is entitled to an injunction.

Butcher, Q.C., and *C. E. Allan*, for the defendants. 1. Under Michael Angelo Taylor's Act the vestry can adjudge that a part of a house obstructs the highway, and can take that part, and they can only take so much as is required for the purposes of their street improvement; they cannot take the whole unless they bonâ fide adjudge that the whole is necessary: *Thomas* v. *Daw* (2); *Gard* v. *Commissioners of Sewers of the City of London* (3); *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (4); *Aldis* v. *London Corporation.* (5) As to *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), the first part of the judgment of Collins J. supports the view for which we are contending; the subsequent dicta were not necessary to the decision of the case and are not binding; and, further, they are not applicable to this case. The test there adopted by the learned judges in determining the question of the right of the vestry to take part only of a house—namely, whether the removal of the part would destroy the identity of the house—is not justified by the language of the Act, which draws no distinction between a house and land; and *Aldis* v. *London Corporation* (5) has decided that, even if the part required by the vestry would destroy the identity of the house, the vestry cannot adjudge that the whole is necessary. By the construction put upon the Act by the Divisional Court, the vestry are placed in a very unjust position, since they are liable to be attacked whether they take the whole or

(1) [1894] 2 Q. B. 742.
(2) (1866) L. R. 2 Ch. 1.
(3) (1885) 28 Ch. D. 486, 494, 508.
(4) (1885) 30 Ch. D. 642.
(5) [1899] 2 Ch. 169.

take a part only of a house. Can it be said that the defendants, who are a public body, are liable to an injunction because they refuse to act ultra vires?

2. The plaintiff is estopped by the negotiations from claiming an injunction: *Lynch* v. *Commissioners of Sewers of the City of London*. (1)

Jenkins, Q.C., in reply. There is no decision that a vestry cannot take the whole of a house if the owner is willing to sell. *Thomas* v. *Daw* (2) and *Gard* v. *Commissioners of Sewers of the City of London* (3) were cases, not of houses, but of lands. In *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (4), and *Aldis* v. *London Corporation* (5), the owner wished to sell the part only. Suppose a bonâ fide dispute as to the powers of the vestry, why should they not be allowed to take the whole, if the owner does not object? Where a house is one and indivisible, it is the whole house which obstructs, even though the actual physical obstruction is caused by that part of the house which lies across the passage way. The landowner is without the protection given to him by the Lands Clauses Act, and therefore the Court has striven to place a reasonable construction on this Act. *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (6), shews that the Legislature did not intend to authorize the vestry to cut a man's house in half.

Cur. adv. vult.

Aug. 2. STIRLING J. (after stating the facts as above). This action raises a question of very considerable difficulty, which is only partially covered by decision. The question has been touched upon in many cases, but has been dealt with specifically in one case only, to which I shall presently call attention. The difficulty arises in this way: that the Act of Parliament with which I have to deal differs from the Lands Clauses Act with which we are more familiar, inasmuch as it does not contain any provision equivalent to that which is found in the Lands Clauses Act, s. 92—that the promoters of

(1) (1886) 32 Ch. D. 72, 79.
(2) L. R. 2 Ch. 1.
(3) 28 Ch. D. 486, 494, 508.
(4) 30 Ch. D. 642.
(5) [1899] 2 Ch. 169.
(6) [1894] 2 Q. B. 742.

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an undertaking desiring to take part of a house shall, if the owner be willing and able to sell and convey the whole, take the whole. The material portions of the Act (57 Geo. 3, c. xxix.) are the 80th and 82nd sections. Sect. 80 provides, "that for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the Commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district . . . . and that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said Commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so altering, turning, widening, extending, lengthening, continuing, or opening the said streets or public places within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said Commissioners or trustees or other persons as aforesaid, and they shall have full power and authority, to treat, contract, and agree, or to employ any person or persons to treat, contract, and agree with the several owner or owners, occupier or occupiers, of all such houses," and so forth, "for the purposes aforesaid." It will be observed that in the first portion of the section which I have read the Act speaks of houses, walls, buildings, and so forth, "or any part thereof"; but in the later part of the 80th section, and also in the 82nd section, which confers the compulsory powers, the words "or any part thereof" do not appear.

Under these circumstances the question arose as to whether a local authority authorized to act under this section could compulsorily take part of a house. That question, after having been mooted in many previous cases, came to be considered in the case of *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1),

(1) [1894] 2 Q. B. 742.

by a Divisional Court of the Queen's Bench Division whose decisions are binding upon me. The head-note is: "Where the authority having control of the streets in a metropolitan district bonâ fide adjudge that part of a house or building obstructs or prevents the widening of a street, ss. 80 and 82 of 57 Geo. 3, c. xxix., give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner, and he cannot require them to take the whole house or building, though he be able and willing to sell and convey the whole to them." There the case came before the Court upon an interlocutory application for an injunction such as is claimed in the present action, and the Court decided that there was jurisdiction to take part of a house under certain circumstances. The reasons are given by both the learned judges who formed the Court (Cave and Collins JJ.), and a few words from their judgments will shew the way in which it is put. Collins J. said (1): "The construction which has been put upon s. 80 in several cases is this: In the first part of the section there are the words 'houses, walls, buildings, or any part thereof,' and the section contemplates that the adjudication made by the Commissioners, both as to the fact of obstruction and as to the necessity of purchase, may be limited to a part. That is arrived at by construing the subsequent words, 'such houses, walls, buildings, lands, &c.,' as embracing the 'houses, walls, buildings, lands, &c., or any part thereof,' previously mentioned. Following that out, s. 81 deals simply with the case of persons incapacitated to treat, but the subject-matter is the same as in s. 80. Sect. 82, which gives the compulsory powers, deals with the case of persons unable by absence or unwilling to treat; but the subject-matter is again simply referred to as 'such houses, buildings, lands, &c.,' thus carrying on through the three sections the initial definition of that which the Commissioners may consider and deal with, namely, 'houses, buildings, lands, &c., or any part thereof.' I think, therefore, that it cannot be successfully argued to-day that the construction which has been put upon s. 80 does not apply to s. 82, because s. 80 has hitherto been considered apart

(1) [1894] 2 Q. B. 752.

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from s. 82. Sect. 80 seems to me to be the foundation of the whole code. The Courts have decided that the words 'or any part thereof' are by implication carried on into the words 'such houses, buildings, lands' in the other part of the section, and I am of opinion that they are so carried on in s. 82."

Now, the Court having arrived at that conclusion refused to grant an injunction, but they proceeded to express a view of the state of the law which it appears to me I am not at liberty to disregard. It was suggested before me that the logical result of the construction of the Act adopted in that case was this: that the local authority, being at liberty to take part of a house, were bound under s. 82 to give proper compensation, and that that compensation would include, first, the value of the piece of land which was taken; secondly, the sums which would be necessary to be expended by the owner in order to put right any damage caused by the severance; and, thirdly, any diminution of value of the land which is left in the hands of the owners. That was not the view, however, which was taken by the two learned judges who decided the case, because they went on to point out a limitation which they put upon the word "part." Cave J. said (1): "You may divide a piece of land and make it two pieces of land, and each is land for all purposes; but you cannot divide a house and make of it two houses; you get something which is not a house. If you take half of a building occupied as a tavern, you do not take a tavern and leave a tavern; you take part of a whole thing, and leave the other part of that whole thing for the previous owner of the whole. So far as I can see, the Act does not contemplate that that shall be done; it does not contemplate that part of a house may be taken in the sense that the owner shall be left with something which is not a house, which cannot be used for the purpose for which the house was used before, and which is essentially different in its character and condition from what the house was before. If that were the case made out here, I should be clearly of opinion that the Act of Parliament did not enable a portion of the house in that sense to be taken, and that the whole house must

(1) [1894] 2 Q. B. 749, 750.

be taken by the vestry." Then later on he says: "I am of opinion, however, that it is not enough to say, as was urged in the argument addressed to us on behalf of the plaintiffs, that any interference with a house, which will have the effect of requiring alterations to be made, and of diminishing the value of the premises to some, however small, extent, is of itself alone sufficient to cast upon the vestry the necessity of taking the whole house or foregoing the improvement which they think is necessary. But, on the other hand, if what the vestry propose to do will have the effect of so altering the character and condition of the house that it can no longer be occupied as the kind of structure it was before, then I am of opinion that the vestry are proposing to do something which the law does not enable them to compel the owner of the house to accede to." I should say that in that case what was sought to be taken was a porch and a cellar.

So also Collins J. said (1): "It is not enough to oust the jurisdiction of the vestry to say simply that the structure sought to be removed cannot be taken and removed without altering the appearance of the premises and involving alterations thereto, and that the taking of the land will diminish the value of the Town-hall Tavern to the plaintiffs. Those facts are not, in my opinion, sufficient to destroy the right of the vestry to give the notice. There must however, I think, be the distinction in point of fact which has already been pointed out between land and a house. Land is by its nature capable of being divided; a house is primâ facie a unit incapable of division; but there are cases in which it would be impossible to say that a portion of a house might not be cut off without destroying the identity of the house itself. If a particular part of a house can be pointed to which the vestry, bonâ fide, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed,

(1) [1894] 2 Q. B. 754.

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is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances I am of opinion that the vestry could not stop short of taking the whole."

Now, as I have said, I think it is my duty to give effect to that exposition of the law; and the result of it seems to be this—that in the construction of this Act a limitation is to be placed on the word "part." If a local authority desire to take part of a house, the portion taken must be something which can fairly be called a "part." If, for example, there is a porch or a conservatory, or a cellar, which can be removed without substantially destroying the house as a house, that, according to the decision, may be taken; but if, on the other hand, a substantial portion is taken by the authority, so that the use of the house is substantially injured and can no longer be enjoyed as it was before, then it seems to me that it is laid down that the whole must be taken.

In the present case the front wall and 4 feet were to be taken. Even if the owner rebuilds the front wall, the shops will be substantially reduced in size. It is said that the back parlour may be thrown into the shop, and the room beyond that used as the back parlour, and so on; but still, even if that were to be done, in my opinion, the house would no longer be so convenient, nor could it be substantially used for the same purposes, as it was before.

In my judgment, according to the law which is laid down by the Divisional Court, the plaintiff is entitled to say that the vestry shall take the whole of these houses.

But it was contended that the plaintiff had lost his right by reason of what had passed between him and the vestry. No doubt, as it appears to me, he contemplated that at some date or other these houses would be pulled down and rebuilt, and there is evidence to shew that a prudent owner, who had capital for the purpose or was in a position to do so, would

probably adopt that course of dealing with the property; but it seems to me that, as regards the negotiations, it simply came to this—that the plaintiff was willing to sell to the vestry a portion of this property upon certain terms. Those terms were not acceded to, and he thereupon said he desired to fall back upon his legal right: his legal right is that which I have already explained. Then, again, as regards his intention to rebuild, I have no doubt that he contemplated at some period earlier or later that these houses would be pulled down and rebuilt. But the owner of property, according to the law of this country, is at liberty to deal with it at whatever time he finds most convenient; and if the vestry for their own purposes desire to anticipate the period at which the owner is willing to act, it seems to me that they must follow the course which is pointed out by the law.

Under all the circumstances, I cannot see that the plaintiff has deprived himself of his legal right, which is, as I have already said, that he is entitled in this case to compel the vestry to take the whole of the houses; consequently, there ought to be an injunction as asked for.

Solicitors: *J. Ernest Moore; J. H. Hortin.*

H. B. H.

STIRLING J.

1900

June 21; *Aug.* 4.

In re CHAYTOR.

[1899 C. 3653.]

Settled Land—Mining Lease—Tenant for Life Impeachable for Waste—Open Mines—Proportion of Rent to be Capitalised—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

A tenant for life under the Settled Land Act, 1882, of mineral land, though not declared unimpeachable for waste by the settlement, is not as regards open mines "impeachable for waste in respect of minerals" within s. 11, and may therefore grant a lease of such mines upon the terms of setting aside one-fourth only of the rent as capital money arising under the Act.

THIS was a summons taken out under the Settled Land Acts, 1882 to 1890, by Sir William Chaytor as tenant for life under a settlement made by the will of Henry Chaytor, deceased, of certain estates in the county of Durham containing minerals. The summons asked for a declaration (1.) that certain mines forming part of the settled estates agreed to be leased by an agreement dated March 30, 1899, made between the applicant and George Bradford, were opened mines; (2.) that if the Court should be of that opinion, one fourth part only of the rent to be reserved by the proposed lease should be set aside as capital arising under the above-mentioned Acts.

Henry Chaytor, who died on June 19, 1897, by his will, made on June 16, 1897, gave all his real estate, including the estates in question, upon trust for Sir William Chaytor for life with remainders over. Sir William Chaytor was not by the terms of the will made unimpeachable for waste. The estates proposed to be leased included three seams of coal known as the Busty seam, the Brockwell seam and the Victoria seam. The two former seams had been worked by the testator up to the year 1880, but they had not been worked since that date. The Victoria seam had not been worked by the testator. The Busty, Brockwell, and Victoria seams were included in a colliery known as the Cartesthorne Colliery. The Victoria seam was situated from twelve to fourteen fathoms below the

Brockwell seam. It was a thin seam, and although it had not been worked was of less value than the two other seams. The intending lessee proposed to work the colliery by opening two fresh drifts or inclined planes, one to the Brockwell seam and the other to the Busty seam, and to use the shaft previously sunk by the testator. He also proposed to extend the drift leading to the Brockwell seam and the shaft to the Victoria seam, but not to open any drift or shaft for that seam only, since in ordinary times it would not pay to work the Victoria seam alone.

Upjohn, Q.C., and *Fischer Williams*, for the applicant. The question of law turns upon the construction of s. 11 of the Settled Land Act, 1882. (1) There are two possible constructions, one that whether there is an open mine or not a tenant for life, unless he is expressly declared by the settlement to be unimpeachable for waste, is impeachable for waste within the section, and must set aside three-fourths of the rent, the other that the words "impeachable for waste" are inapplicable to open mines, and that in the case of an open mine one-fourth only of the rent should be set aside. We submit that the latter construction is the true one. It would be a strange result if a tenant for life who was entitled to work the minerals on the ground that he was unimpeachable for waste by the settlement could retain three-fourths of the rent, while a tenant for life who was entitled to work them on the ground that the mine was an open mine could retain one-fourth only, since he would thus be put on the same footing as a tenant for life who could not work the minerals at all. It is important to observe that the open mine is not an arbitrary exception to real property law, but is founded on the

(1) Sect. 11 is as follows: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

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presumed intention of the testator: *Dashwood* v. *Magniac* (1), per Bowen L.J. Whether the settlor expresses his intention or shews it by his conduct is immaterial when once the intention exists that the tenant for life shall have the right to work the minerals. In neither case is the tenant for life impeachable for waste. That view puts an intelligible construction upon the section. No doubt a difficulty arises from the introduction of the words "whether the mines or minerals are already opened or in work or not"; but those words may have been inserted to make it clear that the tenant for life of an open mine could not under ss. 6 and 9 claim the whole of the rent on the ground that he was outside s. 11. They are, therefore, not superfluous. The text-writers on the subject are equally divided in opinion as to the interpretation to be put upon the section: see Wolstenholme's Conveyancing and Settled Land Acts, 8th ed. p. 329, and MacSwinney on Mines, 2nd ed. p. 180, in favour of the construction for which we contend, and Hood and Challis' Conveyancing and Settled Land Acts, 5th ed. p. 214, and Clerke's Settled Land Acts, 2nd ed. p. 61, contra.

Upon the question of fact whether these mines are open mines: As to the Busty and Brockwell seams, the lapse of time since the working was discontinued is not of itself sufficient to shew an intention to abandon, and there can be no abandonment without intention: *Bagot* v. *Bagot* (2); *Greville-Nugent* v. *Mackenzie*. (3) Those seams, therefore, must still be treated as open mines, and the Victoria seam stands on the same footing, since the working of a new seam under the same piece of land, in conjunction with the seams already opened, is not the opening of a new mine: *Clavering* v. *Clavering* (4); *Spencer* v. *Scurr* (5); *Earl Cowley* v. *Wellesley* (6); *Elias* v. *Snowdon Slate Quarries Co.* (7)

Norman Pearson, for the trustees of the will. On the facts these mines ought not to be treated as open mines. The non-working of the Busty and Brockwell seams by the testator for

(1) [1891] 3 Ch. 306, 360.
(2) (1863) 32 Beav. 509, 516.
(3) [1900] A. C. 83, 90.
(4) (1726) 2 P. Wms. 388.
(5) (1862) 31 Beav. 334.
(6) (1866) 35 Beav. 635, 639.
(7) (1879) 4 App. Cas. 454, 466.

seventeen years before his death, in the absence of any explanation why the working was discontinued, is strong to shew an intention of abandonment. The Victoria seam has never been opened, and it cannot be treated as an open mine within the authorities.

Then as to the construction of s. 11. This tenant for life is impeachable for waste. The question is whether he is also impeachable "in respect of minerals" within the section. It is said that he is not because these particular mines are open, and it is not waste to work them; but that argument does not go far enough. It shews that he is not impeachable for these particular minerals; but that does not satisfy the language of the section. The section says he must capitalise three-fourths of the rent where he is "impeachable for waste in respect of minerals," i.e., any minerals. He is clearly impeachable in respect of some, namely, unopened mines. Therefore he is impeachable for waste in respect of minerals. The argument on behalf of the tenant for life requires "minerals" to be read as "such minerals." But "minerals" in its natural sense means "any minerals," and there is no ground for qualifying the natural meaning of the word. On the contrary, the words "the mines or minerals leased" at the beginning of the section shew that the Legislature was alive to the distinction between minerals in a particular lease and minerals generally, and when it refers to leased minerals it says so. Further, that argument gives no effect to the words "whether the mines are already opened or not," and renders them superfluous. But it cannot be suggested that those words were inserted for no purpose. It is said that no change in the law as to open mines was intended; but, if so, why should the section expressly refer to them? Read fairly, the section shews an intention to alter the law as to open mines, and to provide that a tenant for life impeachable for waste can only grant a lease of an open mine upon the terms of capitalising three-fourths of the rent. The view of MacSwinney and Wolstenholme, that the Legislature did not intend to depart from the principle of the Settled Estates Act, 1877, is erroneous, since the provisions of that Act are quite different. Sect. 4 of that Act empowers the

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Court to authorize (inter alia) a mining lease for forty years on certain conditions, and provides, in the case of a lease of minerals, for the capitalisation of a certain portion of the rent, namely, where the person for the time being entitled to receive the rent, "either by reason of his estate or by virtue of any declaration in the settlement," is entitled to work "such" minerals for his own benefit, one-fourth, and otherwise three-fourths. The word "such" in that section points to the demised minerals only. The omission of the word from the corresponding section of the Settled Land Act, 1882, is significant, and shews that "minerals" there means any minerals. The language of s. 11 was designedly different from that of the corresponding section of the Act of 1877. The construction for which I am contending does not mutilate the section either by addition or omission.

Upjohn, Q.C., in reply.

Cur. adv. vult.

Aug. 4. STIRLING J. This is an originating summons which is taken out by Sir William Chaytor, who is tenant for life, under the will of Mr. Henry Chaytor, dated June 16, 1897, of certain estates in the county of Durham which contain in them coals and other minerals. The first object of the summons is to obtain a declaration that certain mines forming part of the above-mentioned settled estate, agreed to be leased by an agreement dated March 30, 1899, made between Sir William Chaytor of the one part and Mr. George Bradford of the other, are open mines. The mines in question consist of certain beds of coal under the settled estate, which are three in number, known as the Busty seam, the Brockwell seam, and the Victoria seam. The evidence shews that both the Busty and Brockwell seams have been worked for coal, and had been worked by the testator, but that was some time ago. It is said that in consequence of the lapse of time they are no longer open, but must be treated as abandoned mines. I do not agree with that view. It seems to me there is no evidence of abandonment, and that those seams ought to be treated as open mines. As regards the Victoria seam, which is fourteen

fathoms below the Brockwell seam, which is next above it, it is admitted that it has never been worked, and it does not seem to me that within the authorities it can be treated as an open mine.

The next question arises upon the construction of s. 11 of the Settled Land Act, 1882. [His Lordship read the section.] The question is whether as regards open mines the tenant for life is impeachable for waste in respect of minerals within the meaning of the Act. Now, a tenant for life under a settlement may have a title to work mines for his own benefit by virtue of a power conferred on him by the terms of the settlement. A tenant for life may also work open mines, although power to do so is not conferred by the settlement. The title to work such mines is, however, derived from the intention of the settlor, inferred from the use made of the property previously to the settlement.

I may refer to two short passages from recent cases on this point. The first is in the judgment of Lord Lindley in the case of *In re Ridge* (1), where he says this: "As between a tenant for life and remainderman, money paid by a lessee as a price of land won, or carried away and sold by the lessee in the shape of minerals, stones or bricks, is always treated as capital, not as income, unless the settlor has expressed an intention to the contrary by making the tenant for life unimpeachable for waste, or by some other expression; or unless at the time of the settlement the mines and minerals let were open, in which case an intention to the contrary is inferred unless such inference is inconsistent with the language of the settlement."

Then, in the case of *Dashwood* v. *Magniac* (2), Bowen L.J. says this: "Cases in which the usufructuary is allowed to treat minerals as annual fruits or produce of the soil are common to ancient and modern jurisprudence. The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of Edward III. It is important, however, to observe that the open mine does not constitute an arbitrary exception to real property law. It is merely an instance of the application of a well-known principle

(1) (1885) 31 Ch. D. 504, 508. (2) [1891] 3 Ch. 306, 360.

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of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolute master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is therefore from his presumed will and intention that the result in the case of the open mine follows." A tenant for life entitled to work mines may in my judgment be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arises from the terms of the settlement or by inference from the circumstance that the mines are open.

Now, s. 11 of the Settled Land Act, 1882, prescribes that, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth, shall be set aside as capital money under the Act. It is contended that in order that the tenant for life may not fall under the description of "impeachable for waste in respect of minerals" he must be expressly declared by the settlement to be unimpeachable for waste. That is not the language of the Act; but it is said to be the proper construction of it by reason of the generality of the language "in respect of minerals," not "such minerals," or "the minerals." The word "minerals" as there used, however, cannot mean any minerals whatsoever. Some limitation must be put on it, and the choice seems to be between minerals comprised in the settlement and minerals the subject of such a lease as is contemplated by s. 11. The latter seems to me the more natural interpretation.

It is said, however, that this construction gives no effect to the words in the early part of the section, namely, "whether the minerals leased are already opened or in work or not." It is a sufficient answer, in my judgment, that those words serve to remove any doubt which in their absence might arise as to whether the section was meant to apply to opened mines or not.

At all events, it seems to me that the language of the section admits of the two interpretations which I have mentioned. In considering which ought to be adopted, regard may be paid

to the consequences of adopting one or the other of them. If the tenant for life must be expressly made unimpeachable for waste in order to obtain the benefit of s. 11, then a distinction is drawn between an express authority to commit waste and an authority inferred from the use made of the property for which I have been unable to discover any solid foundation. Moreover, under the provisions of the Settled Estates Act, 1877 (an Act which is still in force and to which tenants for life may have recourse), mining leases may be granted, though for a shorter term than under the Settled Land Act, upon the condition that only one-fourth of the rent is set aside as capital. Again, I am unable to discover why such a difference should exist according as one Act is resorted to or the other. On the whole, I think the preferable view is that the tenant for life in this case is under an obligation to set apart one-fourth part, and not three-fourths, of the rent as capital money.

Solicitors: *Tarry, Sherlock & King, for Trotter, Bruce & Trotter, Bishop Auckland.*

H. B. H.

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July 17;
Aug. 7.

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[1899 S. 2007.]

Donatio Mortis Causâ — Validity—Nuncupative Will.

An old lady, shortly before her death and in anticipation thereof, expressed a desire to give all her property to the defendant upon certain conditions, and directed him to record her wishes in writing, which he did. The document purported to give to the defendant all the property she might have at her death, subject to his settling up her affairs, seeing to her burial, and making certain specified payments to named charities. She then delivered to the defendant a deposit note and share certificate, saying, "Take charge of them. If I get better you will bring them back; if not, you will know what to do with them." She subsequently told him where to find some gold and notes, but gave him no further directions as to them:—

Held, that, looking at the transaction as a whole, the intention of the deceased was that the specific articles should be dealt with simply as part of the property which she meant to dispose of as from her death, and over which she meant to reserve dominion during her life; that consequently there was no valid donatio mortis causâ.

THE plaintiff was the legal personal representative of Mrs. Eliza Dash, who died at Bristol on January 31, 1899, intestate. The object of the action was to recover from the defendant, Edwin Thomas Lewis, property of the deceased to a very considerable amount, to which he claimed to be entitled by virtue of a donatio mortis causâ made to him by the intestate shortly before her death. The other defendants were the representatives of certain charitable institutions, who claimed to be beneficially interested in the property so given to Mr. Lewis. The sole question in the action was as to the validity of the alleged donatio mortis causâ.

Mrs. Dash, the intestate, was born about 1812. She was twice married, and became a widow for the second time about twenty years ago. She derived from her second husband, Mr. Dash, a considerable fortune. The defendant, Mr. Lewis, whose integrity and straightforwardness were beyond question, realized her husband's property, and afterwards managed her estate for her. He was in the habit of seeing her once a week,

generally on Thursday evenings. He stated that he had on many occasions urged her to make a will, but she always refused, one reason being that she objected to the payment of duty, and another that she did not wish any one to know her means. Some months before her death she said to Mr. Lewis that she had been thinking over how she would like her property disposed of, and asked him to "jot it down." He proceeded to do so; but after a time she said she would go no further, and Mr. Lewis went away and left the paper with her. Thus matters stood on Thursday, January 26, when Mr. Lewis called on her and found her very ill. What took place was thus stated by him in a written statement, of which a copy was furnished to the plaintiff, and which was put in evidence by the Attorney-General in Mr. Lewis's cross-examination. "I went there on the Thursday evening, and found her very unwell. She then said, 'I think you had better go on with what we were talking about the other night.' She produced the bit of note-paper on which I had previously made a memorandum of amounts which she wished to give. She then said, 'You will please to write down what I tell you.' I said, 'It will be of no use, Mrs. Dash.' She said, 'Don't tell me that. If I give you everything, you can certainly do what I tell you with it.' I said, 'How am I to begin?' She said, 'You know what to say. I give you everything, subject to your settling my affairs, seeing to my burial, and paying the amounts to the charities and persons I name.' Before writing out the paper I said, 'I don't know what to say. You ought to have a solicitor here.' 'No,' she said; 'I am going to give you everything if you promise me (and I am sure if you promise me you will fulfil) that you will do what I tell you.' After this I wrote out on a bit of paper the heading in my own words, and copied the amounts and names from the memoranda previously made by me. She could scarcely write her name at the best of times, even when she was well. I said, 'You must do something.' She said, 'I will write my cross.' She made her cross, and I wrote her name on the paper after she had made the cross." The paper there referred to was in these terms: "40, Horefield Road, Bristol. January 26th, 1899. I, Eliza Dash, residing

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at the above address, do give the whole of my property, whatever it may consist of at the time of my decease, to Edwin Thomas Lewis, of Upton Lodge, Cotham Park, Bristol, upon the distinct promise that he will settle up my affairs and see to my burial, and will also give the following sums to the charities and persons named." Then followed a list of names with the amounts set opposite to them, and the document concluded with "The mark of Eliza Dash" and a cross. Mr. Lewis's statement proceeded: "After she had made her cross she said, 'You had better go upstairs into the back room, and in a basket near the bedside you will find the deposit note and Usher's shares.' 'Usher's shares' meant the certificate of shares in a brewery company which she held. There were two keys on the table, and she gave me one. I took it, and went upstairs. I found the door locked, and unlocked it. I lifted up some clothes from the top of the basket, and found a banker's deposit note for 30,000*l.* and a certificate for 200 5*l.* preference shares in Usher's Brewery Company. There were two or three small parcels done up in paper. I have since found they were gold. She had particularly mentioned the deposit note and Usher's shares. I brought down the deposit note and the share certificate, and gave them to her. She had them in her hands. She handed them back to me, and said, 'You take charge of them. If I get better, of course you will bring them back'"—to which there was added, in a subsequent statement by Mr. Lewis, also put in evidence, "If I don't, you will know what to do with the money." That having been done, Mr. Lewis went away on that occasion. He next saw her on January 30, when he called between five and six o'clock. On that occasion he said: "There were two persons in the room, one Mrs. Dash and the other the charwoman, Mrs. Brooks. She motioned me to ask Mrs. Brooks to leave the room. I asked her how she was. I said, 'I see you are ill,' and she said, 'Yes, it is a bad job, I am afraid. I am not getting better; if I don't get better, you will find in the back room, where you found the deposit note and share certificate, some gold done up in paper'—she did not say how much—'and under the cover of an old directory you will find 300*l.* in notes.'" He went away without doing anything

more on that occasion; and on the following day, January 31, this took place: "When I went she was still alive, but sinking fast; and, seeing the position she was in, I went up and took possession of the gold and notes where she told me. Mrs. Brooks was there when I arrived. I told Mrs. Brooks to come upstairs, and I took the money from the directory and brought it downstairs, and went into the back room where Mrs. Dash was." Then he said he counted the gold and notes, and found 123*l.* 10*s.* in gold and 300*l.* in notes. The lady died on the same evening, about a quarter to eleven, and this property remained in the possession of Mr. Lewis.

Mr. Lewis then communicated with the treasury solicitor and told him everything.

Sir R. Finlay, *A.G.*, *Sir E. Carson*, *S.G.*, and *Ingle Joyce*, for the plaintiff.

Swinfen Eady, *Q.C.*, and *Christopher James*, for the defendant Lewis. There has been here a valid donatio mortis causâ. The deceased had a fixed determination not to make a will, and the document which she signed was not intended to be testamentary. The gift was made in anticipation of death; there was delivery of all the articles in dispute; and the gift was conditional on the lady's death. It fulfils all the conditions of a good donatio mortis causâ. With regard to the subject-matter of the gift no difficulty arises. There are many cases which have decided that a deposit note may be good subject-matter, and we submit that the share certificate stands upon the same footing: see *In re Dillon*. (1)

Nor is it any objection to the validity of the gift that a trust has been engrafted upon it. Neither the condition that the donee shall make particular payments out of the property nor the condition that he shall provide for the funeral of the deceased invalidates the gift: *Hills* v. *Hills*. (2) Lastly, the direction by the deceased to Lewis when the articles were delivered to "take charge of them" will not prevent the gift from being a donatio mortis causâ: *Moore* v. *Darton*. (3)

(1) (1890) 44 Ch. D. 76, 83. (2) (1841) 8 M. & W. 401.
(3) (1851) 4 De G. & Sm. 517.

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Upjohn, Q.C., and *Buckmaster*, for the charities. On the question whether the transaction is to be treated as a donatio mortis causâ or as a nuncupative will, *Hills* v. *Hills* (1) is on all fours with the present case: see also the passages quoted from the Digest and the Code in *Hambrooke* v. *Simmons*. (2)

Sir E. Carson, S.G., and *Ingle Joyce* (*Sir R. Finlay, A.G.*, with them), contra. There is no authority which extends the doctrine of donatio mortis causâ so far as is required for this case. Looking at all the circumstances, this is an attempt to make a nuncupative will, and an attempt to make a nuncupative will will not be good as a donatio mortis causâ: *Ward* v. *Turner*. (3) The document drawn up by Lewis contains everything necessary for the purpose of being proved as a will except the attestation of two witnesses: *Masterman* v. *Maberly*. (4) This is not a gift of specific chattels, but a gift of the whole estate of the deceased at the time of her death. To allow this gift to prevail would be (to use the language of Bowen L.J. in *In re Hughes* (5)) to enable any one who pleased to drive a coach and four through the Wills Act.

Then as to delivery, there has been no delivery of the gold and notes, but Lewis took possession of them himself; there was no separate and independent gift of the deposit note and share certificate, but merely a handing over of a part of the property to be dealt with on the terms of the document; and, further, there is no case where delivery of a share certificate has been held to be a good gift of the shares. In *Moore* v. *Moore* (6) it has been held that railway stock cannot be the subject of a donatio mortis causâ, and the principle of that case applies here.

Swinfen Eady, Q.C., in reply. The defendant's claim is not based upon the document, and does not extend to the whole property of the deceased, but is limited to the property actually handed over. The expression of desire that the donee shall have all the property of the deceased does not affect the matter: see *Hills* v. *Hills*. (1)

(1) 8 M. & W. 401.
(2) (1827) 4 Russ. 25, 27.
(3) (1752) 2 Ves. Sen. 431, 437.
(4) (1829) 2 Hagg. Ecc. 235, 247.
(5) (1888) 36 W. R. 821.
(6) (1874) L. R. 18 Eq. 474.

As to *Ward* v. *Turner* (1), the decision was that a common stock receipt was not a document of title to the stock itself, and in this respect I say it differs from a share certificate; and, secondly, that there was no delivery. Again, in *In re Hughes* (2) there was no delivery. As to *Moore* v. *Moore* (3), I submit it is inconsistent with *In re Dillon* (4), and ought not to be followed. The legal transfer of shares is not necessary to make a valid donatio mortis causâ. The law has grown since Lord Hardwicke's time, and a donatio mortis causâ may be valid now which would not be valid then.

As to the gold and notes there was sufficient delivery.

Cur. adv. vult.

Aug. 7. STIRLING J. (after stating the facts as above). The question which arises to be determined is whether or not the alleged donatio mortis causâ is valid in law. It was held in *Hills* v. *Hills* (5) that a gift may be good as a donatio mortis causâ, although it is coupled with a trust or condition that the donee shall provide the funeral of the donor; but, as is pointed out by Parke B., such a circumstance affords a "very strong argument that the deceased did not intend to make a donatio mortis causâ but, as it were, to make the defendant her executor under a nuncupative will." That is one mode of formulating the question which arises in such cases. It was put to the jury in another way by the learned judge who tried the case of *Hills* v. *Hills* (5) (Lord Cranworth) namely, "whether it was intended as an absolute gift to the defendant after the death of the intestate, or whether she intended to retain a control over the property during her life." I understand that to refer to what is established law, namely, that in order to constitute a good donatio mortis causâ the donor must not merely part with the possession of, but also with the dominion over, the thing given: see *Hawkins* v. *Blewitt* (6); *Reddel* v. *Dobree*. (7) I am now in the position of the jury

(1) 2 Ves. Sen. 431.
(2) 36 W. R. 821.
(3) L. R. 18 Eq. 474.
(4) 44 Ch. D. 76.
(5) 8 M. & W. 401.
(6) (1798) 2 Esp. 663; 5 R. R. 761.
(7) (1839) 10 Sim. 244.

STIRLING J. in *Hills* v. *Hills* (1), and have to decide a question similar to that which arose there. In determining such a question all the circumstances must be taken into consideration. The case for the defendants is strongest with reference to the deposit note, and that I proceed to consider. According to the written statement of Mr. Lewis, Mrs. Dash more than once stated her intention to give him everything. She directed him to write down what she told him; he said it would be of no use. She then said, "Do not tell me that. If I give you everything you can certainly do what I tell you with it." He agreed to write, and asked her how he was to begin. She said, "You know what to say. I give you everything if you promise me (and I am sure if you promise me you will fulfil) that you will do what I tell you." Her intention, therefore, being to give everything, she could not mean to divest herself of everything at the moment when she called on him to record her wishes. That is made perfectly clear in the written document, which I regard as of the greatest importance as being a formal contemporary record written at the earnest solicitation of Mrs. Dash of what was intended to be done. It begins, "I do give the whole of my property, whatever it may consist of at the time of my death." Over all that property, therefore, she intended during her life to retain a power of disposition. Further, the document seems to me to be distinctly of a testamentary character. In substance, it contains directions for payment of debts and funeral expenses and legacies. After the paper was written and signed by a cross, she directed Mr. Lewis to a place where he would find the deposit note. Upon his return she took it from him, and handed it back to him, saying, "You take charge of it. If I get better of course you will bring it back"; to which is added, "If I do not, you will know what to do with the money." That language might be used so as to create a donatio mortis causâ; but it must, as I conceive, be interpreted in connection with what had previously taken place. In my judgment, Mrs. Dash meant that Mr. Lewis was to take charge of the note and deal with it simply as part of that which she meant to dispose of as from

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(1) 8 M. & W. 401.

her death, and over which she shewed her intention to reserve dominion during her life. The reference to the note being brought back if she recovered does not seem to me to exclude such dominion: it only shews that she did not at the time consider that she was likely to exercise it. This is, I think, shewn by the additional statement made by the deceased to Mr. Lewis, namely, "If I do not get better, you will know what to do with the money," referring, as Mr. Lewis admitted, to the document which she had signed on January 26. In my opinion, therefore, there was no valid donatio mortis causâ of the deposit note, and the gift fails as to that; it a fortiori fails as to the other subjects of disposition. In my judgment, the plaintiff is entitled to the relief asked.

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Solicitors: *Solicitor to the Treasury; Arber & Lewis, for Press, Inskip & Press, Bristol; Nisbet, Daw & Nisbet, for Isaac Cooke, Sons & Acton, Bristol.*

H. B. H.

In re COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY. DAVIS *v.* NORTON.

STIRLING J. 1900 *Aug.* 7, 9, 11.

[1899 C. 3887.]

Building Society — Winding-up — Construction of Rules — Withdrawal of Members — Priority—Deceased Member — Executor—Loan by Society to Member—Set-off.

The rules of a building society provided that members might withdraw from the society on giving certain notice; that the amounts receivable on withdrawal should be subject to any payments or deductions as might be determined by the directors; that payment of withdrawals should be made according to priority of receipt of notice by the society; and that the directors should have power to limit the number of shares to be withdrawn in any one month, and to limit the withdrawals so that they should not exceed one-half of the monthly income from share subscriptions. The directors had determined by resolution "that the terms of the rules limiting the shares withdrawable be enforced." The society went into voluntary liquidation. All outside creditors had been paid, but the assets were insufficient to meet the claims of all the shareholders:—

Held, that members who had given notices of withdrawal which expired

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before the commencement of the winding-up were entitled to be paid in full in priority to those whose notices had matured later, or who had given no notice at all:

Held, also, that the executor of a member who had died before the winding-up was entitled to priority over withdrawing members.

A member who had given notice of withdrawal, afterwards accepted from the society a loan upon terms whereby he still continued to receive interest upon his share, but paid interest upon his advance:

Held, that he was not entitled in the winding-up to set off the amount of his share against the unpaid balance of the loan.

ADJOURNED SUMMONS.

The above-named society was incorporated in 1880 under the Building Societies Act, 1874, and thereafter carried on business for some years.

On June 26, 1895, in consequence of the dissatisfaction of members as to the conduct of the society's business, a special general meeting was summoned, by notice under the rules, for July 10, to consider the advisability of dissolving the society. The meeting was held and adjourned until August 8, on which date a resolution was passed for a voluntary winding-up.

On November 1, 1895, the deed of dissolution was registered.

On June 26, 1895, the society consisted of 396 members, of whom 130 had paid up the full amount of their shares. At that date 151 members had given notice of withdrawal under the rules, and their notices had matured. Other members had given notices of withdrawal which matured, some before July 10, others before August 8, and others before November 1, 1895. One member had died before June 26, 1895, without giving notice of withdrawal.

Rule 67 of the society's rules provided as follows: "Any person who shall have been a member of the society for six months and shall not have received any advance out of the funds of the society, and whose subscriptions and fines are not in arrear, shall be at liberty to withdraw from the society, upon giving the society one month's previous notice in writing of his intention. The amounts receivable by members on withdrawal will be those contained in Table A scheduled to these rules, but subject nevertheless to any payments or deductions, as may be determined by the directors. Payment of with-

drawals shall be made according to the priority of the receipt of the notice of withdrawal by the society."

Rule 68 was in the following terms: "The directors shall have full power from time to time to limit the number of shares that shall be withdrawn in any one month, and to limit the withdrawals so that they shall not exceed one-half of the monthly income from share subscriptions, and all previous applications for advances shall have priority over notices of withdrawals."

The directors had determined that the amounts receivable on withdrawal should be subject to payments or deductions under rule 67; and at a meeting of the directors held on March 23, 1893, it was resolved "that the terms of rule 68 limiting the shares withdrawable be enforced."

This summons was taken out by the plaintiffs, who were the trustees of the deed of dissolution, for the determination of the rights of priority of the different classes of members in the distribution of the surplus assets of the society. All outside creditors had been paid, but the assets were only sufficient to satisfy half the amount due to members, and it appeared that the claims of members who had given notices of withdrawal would exhaust the whole of the assets; consequently, the summons had not been served upon members who had given no such notice.

A further question arose in the winding-up under the following circumstances.

In September, 1892, the defendant Saunders, who was the holder of a fully paid-up share, gave notice of withdrawal pursuant to the rules. In answer he received from the secretary of the society the following circular: "I am in receipt of your intimation to withdraw the amount of your share account, but allow me to call your attention to our system of advances, adopted largely by subscribers, which enables them to retain their capital or investments untouched or diminished. We can grant you an advance of 41*l.* at once, simply on your certificate. This sum can be repaid by monthly or other instalments, for such an amount as you may determine (suiting your circumstances). And as the expenses (which are trifling)

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are included in the repayments, the above-named amount will be paid in full." After pointing out the advantages of the system, the circular proceeded: "The advance does not interfere with the interest on your investment, which is payable as if no advance had been made, the advance being treated as a separate and distinct transaction by the society from the investment, which is in no way disturbed by it." After explaining the operation of the system, the circular went on: "I have frequently found from subscribers, that because they require a few pounds for some trifling necessity, they forthwith transmit a notice to withdraw their invested savings. To prevent such an ill-advised course, the society's system is intended to supply them with those means without withdrawing any part of their investments, but once the investment is repaid by the society all feeling of duty to replace the withdrawn amount by the investor ceases, and a valuable source for emergencies extinguished, which might afterwards be regretted through greater necessity arising."

Mr. Saunders accepted the terms of the circular, and received 41*l.* from the society, in respect of which he had made certain repayments. Until the winding-up he continued to receive interest upon his share. The question was whether Mr. Saunders was liable to repay to the society the unpaid balance of the 41*l.* which he had received upon loan.

E. A. Wurtzburg, for the trustees.

F. H. Maugham, for the defendant Cobley, whose notice of withdrawal had matured after June 26, 1895. Cobley is in the same position as members who have given no notice of withdrawal. The effect of the dissolution was to suspend the right of withdrawal. The result of the resolution of March 23, 1893, putting in force rule 68, was to limit the withdrawals so that they should not exceed in amount one-half of the monthly income from share subscriptions. The act of the directors must be read into rule 67.

This case is not within the decision in *Walton* v. *Edge*. (1)

G. Cave, for the executor of the deceased member. The

(1) (1884) 10 App. Cas. 33.

rules do not provide for an executor giving notice of withdrawal. The word "withdrawing" in the rules is ambiguous. The estate of a deceased member is entitled to priority over withdrawing members: *In re West London and General Permanent Benefit Building Society.* (1)

R. J. Parker, for the defendant Norton, whose notice matured prior to June 26, 1895. The right of withdrawal under rule 67 is not affected by any limitation which the directors can put upon the number of shares to be withdrawn under rule 68. The rules in *In re West London and General Permanent Benefit Building Society* (1) were different to these.

Owen Thompson, for the defendant Saunders. It must be admitted that the advance to Saunders was ultra vires: *Cullerne* v. *London and Suburban General Permanent Building Society* (2); but, the outside creditors being satisfied, he is entitled in equity to set off his debt to the society against the amount of his fully paid shares: *Brownlie* v. *Russell* (3); *In re Coltman.* (4)

Cur. adv. vult.

Aug. 11. STIRLING J. On the first point arising on the summons, I have, in this case, to construe a rule of a building society which is, perhaps, not less clearly expressed than a good many others. It is a rule which relates to the withdrawal of shares. [His Lordship read rule 67, and continued:—]

That, therefore, empowers any person who has become a member of the society for the prescribed time of six months, and who has not received any advance, and whose subscriptions and fines are not in arrear, to withdraw from the society; and he is to exercise that power upon giving the society one month's previous notice in writing of his intention. The result of withdrawing is that he becomes entitled to receive certain amounts mentioned in Table A contained in the schedule to the rules, and that the payment of those amounts which are receivable by a member who withdraws is to be made according to the priority of the notice of withdrawal. So that, out

(1) (1898) 78 L. T. 393.
(2) (1890) 25 Q. B. D. 485.
(3) (1883) 8 App. Cas. 235.
(4) (1881) 19 Ch. D. 64.

STIRLING J. of the funds available, those members who give notice of withdrawal are entitled to be paid the prescribed amounts according to the priority of the receipt of the notice of withdrawal by the society. Now we come to the rule which gives rise to the question. [His Lordship read rule 68, and continued:—]

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Now, what the directors did at a meeting on March 23, 1893, was to pass a resolution in these terms: "It was unanimously resolved that the terms of rule 68 limiting the shares withdrawable be enforced." That is, perhaps, less clear than the rule, but it does not seem to me, if I am to read it ut res magis valeat quam pereat, that I can apply that to the first branch of the rule, which says, "the directors shall have full power from time to time to limit the number of shares that shall be withdrawn in any one month," because they do not specify any number, and they do not say that no shares are to be withdrawn. I assume they could pass such a resolution, but that is not what they did. They simply say, "the terms of rule 68 limiting the shares withdrawable be enforced." If that has any meaning at all, it must be to limit the withdrawals, so that they shall not exceed one-half of the monthly income from share subscriptions. Now, what is the meaning of that? The first branch of rule 68 confers on the directors a power to say how many shares shall be withdrawn in any one month, and they might have so done, but they have not. The second branch of the rule seems to me to be directed to limiting the amount which is to be withdrawn during that period and to limit the withdrawals—that is the amounts to be withdrawn—so that the total amount withdrawn shall not exceed one-half of the monthly income from share subscriptions. Now, it is contended that when once notices of withdrawal are given in a particular month to an extent exceeding the amount of one-half the monthly income from share subscriptions during that month, subsequent notices cease to have any effect. But that is not in the rule, and I do not see how I can read that into it. Rule 67 confers an absolute right of withdrawal, and all that rule 68 appears to me to do is to limit the working out of the withdrawals so as to confine them in operation to a fund consisting of one-half the monthly income from share subscrip-

tions. I do not think that a notice of withdrawal becomes invalid because there happens to be a large number of notices of withdrawal previously given in a particular month.

Then it is said that in giving effect to this rule injustice may be done to the withdrawing member, because he may have a long time to wait for payment, and in the interval he will not be entitled to any interest. All I can say as to that is that a member withdraws at his own option; he is not compelled to withdraw, and if he chooses to withdraw he must take the consequences which are prescribed by the rules of the society of which he has become a member. The result will be, therefore, that the notices which were given prior to the date of the resolution for winding-up will exhaust the whole funds of the society.

As to the priority of the deceased member, I think the matter is really covered by the decision of the Court of Appeal in *In re West London and General Permanent Benefit Building Society* (1), because there it is laid down broadly by Lindley M.R. that "there is nothing requiring notice of withdrawal to be given. Whether a member gives notice to withdraw or not, on his death he ceases to be a member." That is the basis of the decision. There is nothing in these rules which takes this case out of that. I think, therefore, that the executors of a deceased member take priority according to the declaration that is contained in the order in that case. The effect of it seems to be that a deceased member will take precedence of all persons who have given notice to withdraw. The rights must be determined as at the date of the dissolution.

As to the right of "set-off" claimed by the defendant Saunders, he was a holder of one share in the society. [His Lordship then stated the facts which gave rise to this question, and continued:—] It is admitted that the advance made to him by the society was an ultra vires transaction. The result of that is that part of the assets of the society have got improperly into his hands, and he is liable to restore that part of the assets to the coffers of the society, to be applied in accordance with the rights of those who are entitled to those assets. All

(1) 78 L. T. 393, 396.

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outside creditors of the society have been paid, and the shareholders who have given notice of withdrawal prior to the commencement of the winding-up are entitled next to have the assets applied in payment of the sums due to them on withdrawal in accordance with the rules. For the present purpose, under the circumstances which I have stated, Mr. Saunders is not to be treated as a member who has given notice to withdraw. I think that by accepting the proposal of the secretary of the society he waived the notice he had given, and elected to remain a continuing member of the society. Now he has paid up his share in full, and, consequently, he cannot be called upon to pay anything more in his capacity of a member of the society in respect of that share. But, unfortunately for him, he has entered into a transaction which has resulted in a liability to make good part of the assets of the society, and this liability is not one which arises out of his position as a shareholder, but by reason of a separate transaction which he has entered into in the way I have described. I am unable to see why he should not be required to discharge this liability for the purpose of satisfying the claims of those who are entitled to the assets of the society in priority to himself. Then the case of *Brownlie* v. *Russell* (1) was relied upon on behalf of Mr. Saunders; but when that case is carefully considered it appears to be quite different in its nature. There a holder of a share was insisting on a benefit which was expressly conferred by the rules, and it was held that he had the right to do so, and was not to be deprived of it by any implication which might arise in the absence of express provision. The portion of Lord Selborne's judgment which was so much relied upon, when read in connection with the context, appears to shew this clearly. He says: "We have nothing to do here with creditors—that is admitted on both sides—and nothing remains to be done in the winding-up except to adjust the rights of the contributories or members of the society inter se. What are those rights? How are we to ascertain them? They must be ascertained from the contract by which the parties were brought together. This is not a

(1) 8 App. Cas. 235, 248.

joint stock company; still less is it a common law partnership; but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes. A fallacy, which has pervaded much of the argument that has been offered to your Lordships in support of the appeal, is that, because the members of this society are associated together for a common purpose, therefore there must, in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, and contracts of a different kind, but that we must look at this particular contract." When that particular contract was looked at, it was found that there was an express stipulation dealing with that case. In the present case there is none. It is intimated that the rights of the contributories or members of the society inter se are to be adjusted; but there is no express provision in the contract which shews in the present case how that is to be done. It seems to me that it must be done according to general equitable principles, and it does not seem to me to be in accordance with equity that Mr. Saunders should be allowed to retain for himself a portion of the assets of the society to which other persons have a prior claim. In my judgment, therefore, he is bound to contribute. The order will be as follows:—

Declare that the defendant Greener as executor of the deceased member James Meadows is entitled to be paid in priority to all members who have given notice of withdrawal, the order in this respect to follow that made by the Court of Appeal in *In re West London and General Permanent Benefit Building Society*, 78 L. T. 393; and that subject thereto members whose notices of withdrawal matured prior to 26th June, 1895, are entitled to be paid in full and without any deduction in priority to all other members and according to the priority of the receipt of the notice of withdrawal by the society; Declare that members to whom advances have been made on the security of their shares on the terms of the circular exhibited to the affidavit of the defendant Saunders are not entitled to set off the amounts due from them against the sums due to them out of the surplus assets of the society as against the persons whose

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notices of withdrawal matured prior to 26th June, 1895; Appoint defendant Norton to represent the class of members whose notices matured prior to 26th June, 1895, and the defendant Cobley to represent the class of members whose notices matured after 26th June, 1895, or who gave no notice of withdrawal, and the defendant Saunders to represent the class of members to whom advances on the security of their shares were made on terms of the above-mentioned circular; costs of all parties as between solicitor and client to come out of the fund, including, in the case of the plaintiffs, all proper costs charges and expenses. The rest of the summons to stand over with liberty to apply.

Solicitors: *Busk, Mellor & Norris, for Little & Lyle, Bath; Peacock & Goddard, for R. D. Sharp & Symonds, Bournemouth.*

G. A. S.

KEKEWICH J.

1900

Aug. 8.

In re SEARLE. SEARLE *v.* BAKER.

[1900 S. 2268.]

Tenant for Life and Remainderman—Settlement by way of Trust for Sale—Conversion—Real Estate—Postponement of Sale—Interim Rents—Enjoyment in Specie—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 63.

Where by a will or settlement property is directed to be sold and converted and the proceeds held in trust for one for life and then for others, and, either in exercise of a power of postponement or without any impropriety, the sale is postponed, the person entitled to the life interest in the proceeds is, as regards real estate, entitled to the rents and profits thereof until sale, and is consequently to be deemed to be the tenant for life thereof within s. 63 of the Settled Land Act, 1882.

Yates v. *Yates*, (1860) 28 Beav. 637, considered.

ORIGINATING SUMMONS.

Albert J. E. Searle by his will, dated July 27, 1894, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and to stand possessed of the proceeds upon trust to pay the income thereof to his wife for life, and after her death in trust for his daughters as therein mentioned, and he empowered his trustees to postpone the sale and conversion for so long as they should think fit during his wife's life, and to let any hereditaments for the time being remaining unsold, either from year to year or for any term of years, at such rents and subject to such stipulations as they should think fit, and generally to manage the same as they should think best. The will contained no direction as to the income arising from the said hereditaments until the sale thereof.

On February 28, 1895, the testator made a codicil to his will not material for the present purpose, and he died on October 14, 1895.

The property comprised in the testator's residuary real estate remaining unsold at the date of this summons included a public-house known as the Plume of Feathers, Bristol, and certain other houses in Bristol, all of which were let on lease.

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This summons was taken out under the Settled Land Acts, 1882–1890, by the testator's widow, as tenant for life, or a person having the powers of a tenant for life, under the settlement created by the will and codicil of her late husband, asking that she might be authorized to exercise the powers conferred on her by s. 63, together with ss. 6 to 10, of the Settled Land Act, 1882, with reference to the public-house in question by accepting a surrender of the existing lease, and granting a new lease thereof in the terms of a draft proposed new lease, subject to the approval of the Court being obtained; and further that, in pursuance of s. 7 of the Settled Land Act, 1890, she might be authorized to exercise the powers conferred by s. 63, together with ss. 6 to 13, of the Settled Land Act, 1882, with reference to all the settled premises by accepting surrenders and granting building and other leases thereof for such terms and upon such conditions as were specified in the said Act of 1890.

Warrington, Q.C., and *Marcy*, for the widow. The question is whether the widow is to be deemed to be a tenant for life under the Settled Land Act, 1882, within the meaning of s. 63. That depends on the question whether she is entitled to the rents and profits of this residuary real estate until sale.

1. Upon the construction of the will, having regard to the fact that the power of postponement is limited to the life of the wife and to the power of letting, the true inference to be drawn is that she is entitled to those rents and profits in specie.

2. Upon the authorities, in the case of real estate, where it is not a breach of trust to postpone conversion, the tenant for life is entitled to the actual rents and profits, neither more nor less. That is a qualification of the general principle that land to be converted into money is to be regarded as money: Lewin on Trusts, 10th ed. p. 1161; *Casamajor* v. *Strode* (1) and *Fitzgerald* v. *Jervoise*. (2) In the latter case the head-note is inaccurate, inasmuch as the decision was, first, that the plaintiff was entitled to the rents and profits as tenant for life;

(1) (1809) 19 Ves. 390, n. (2) (1820) 5 Madd. 25; 21 R. R. 268.

and, secondly, that if not so entitled, he was entitled as heir-at-law. The effect of those two cases is that where there is a trust for conversion it is treated as taking effect at the period when by the terms of the instrument the conversion is to take effect, but notwithstanding that, in the case of real estate, the person entitled to the proceeds for life is entitled to the actual rents until conversion. There is no case in which the principle of *Brown* v. *Gellatly* (1) has been applied to real estate, and there are cases in which that principle has not been so applied. In the case of real estate a trust for conversion involves a trust to pay the rents to the tenant for life until actual conversion: *In re Laing's Trusts* (2); *In re Carter* (3); *Hope* v. *D'Hédouville* (4); Jarman on Wills, 5th ed. p. 569.

Rolt, for the trustees. The question is what has the testator given to the tenant for life. Why should there be an implication as to the rents of real estate and not as to the income of other property? The power of postponement is given for the benefit of the estate, and, that being so, the tenant for life is not entitled to the income in specie: *Brown* v. *Gellatly*. (5) Take the converse case. Suppose the testator had had a reversionary interest in land which the trustees in their discretion did not sell, the tenant for life would be entitled upon the sale to be recouped the loss of income: *Wilkinson* v. *Duncan*. (6) The principle of that case applies to real estate as well as to personalty. But if the tenant for life is entitled to recoupment where the postponement is against her interest, she cannot take the income in specie in the present case. *Yates* v. *Yates* (7) deals with this point.

[KEKEWICH J. The Master of the Rolls did not mention real estate.]

No; but he was dealing with real estate. For this purpose there is no sound reason for any distinction between real and personal estate.

There is no sufficient indication in the will of an intention

(1) (1867) L. R. 2 Ch. 751.
(2) (1866) L. R. 1 Eq. 416.
(3) (1892) 41 W. R. 140.
(4) [1893] 2 Ch. 361.
(5) L. R. 2 Ch. 757.
(6) (1857) 23 Beav. 469.
(7) 28 Beav. 637.

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on the part of the testator that the widow should be entitled to the rents and profits until sale.

KEKEWICH J. The question in this case really is whether the testator's widow is entitled to the rents and profits until sale of the real estate which was devised upon trust for sale, and to pay her the income of the proceeds during her life, with a power to postpone the sale during her life at the discretion of the trustees. If she is so entitled, of course she is a tenant for life, and entitled to exercise the powers of a tenant for life under the Settled Land Act. Mr. Rolt's argument is based entirely on this—that the law is settled as regards personal estate that where there is a trust for conversion, and no specific gift to the tenant for life of the income of existing investments until conversion, the tenant for life is not entitled to the actual income, but to something else, and that there is no reason for any distinction between real estate and personal estate. I think that that argument is unsound. Why there should be that distinction between personal and real estate is not for me to inquire; but the distinction runs through many cases, which shew that for many purposes real and personal estate must be considered on a different footing.

I think that the authorities are clear that where there is a trust for sale of real estate, and the proceeds are settled on a tenant for life, then, at any rate so long as the sale is not improperly postponed, the person entitled to the income of the proceeds is entitled to the rents and profits of the estate until sale. That appears to me to be the purport of the authorities, though they are not so unanimous as I could wish. In *Yates* v. *Yates* (1) the Master of the Rolls was not apparently distinguishing between real and personal estate. Whether he thought that the same rule applied to both is not for me to say; but, having regard to the other cases to which I am about to refer, if he did intend to lay down that the same rule was applicable to real and personal estate, I think that his decision is at variance with the later cases, and ought not to be followed.

The case of *Fitzgerald* v. *Jervoise* (2), in which, as Mr.

(1) 28 Beav. 637. (2) 5 Madd. 25; 21 R. R. 268.

Warrington pointed out, the head-note is incorrect, is not a very satisfactory case. I think that the Vice-Chancellor did in fact decide that the tenant for life was entitled to the rents and profits as tenant for life; but he seems to have protected himself by the reflection that, if not, he was entitled to them as heir-at-law.

The decision in *In re Laing's Trusts* (1) is open to the observation that there was no argument against the conclusion at which the Vice-Chancellor arrived. But it would be wrong to assume that Wood V.-C. expressed an opinion so definite without having before him the principles on which he intended to decide.

I put those cases aside, not as throwing no light on the case, but as being open to the observations I have made. But the old case of *Casamajor* v. *Strode* (2) is exactly in point. In that case "Wm. Strode devised real estates to trustees, upon trust 'as soon as conveniently may be after my death' to sell and dispose of the same either by public or private sale; and to stand possessed of the proceeds on certain trusts, for several persons respectively for life, and after their respective deceases for their children."—It does not appear that there was any power to postpone the sale in that case—"The decree declared, that the devisees for life named in the will are entitled to the rents and profits of the real estates thereby devised from the decease of the testator."

Unfortunately, there is no more than a statement of what the decree was; but it is a decision on the very point, because the tenants for life there could only have been entitled because they were tenants for life of the proceeds of sale.

I will pass lightly over the cases before myself; but they were fully argued, and I do not think I can state what I believe to be the rule better than I stated it in *In re Carter* (3): "Abundant cases shew that in the case of real property, where a sale is directed, with discretion to postpone, this discretion is given not for the convenience of the persons but of the estate;

(1) L. R. 1 Eq. 416.

(2) 19 Ves. 390, n. [The whole substance of the case, as reported in this note, is contained in the quotation above.]

(3) 41 W. R. 140, 141.

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and, therefore, the tenant for life may have the income, and the trustees may not postpone the enjoyment of any object of the trusts."

The passages which were quoted from Jarman and Lewin state the rule to be as I have said. The passage in Jarman is quite plain, and, as I gather, the author did not in the least rely on the more modern authorities. Lewin certainly did not, for he quotes nothing later than *Fitzgerald* v. *Jervoise.* (1)

I thought at first that there was a little ambiguity in Lewin's statement (10th ed. p. 1161): "if a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A. for life with remainders over, the tenant for life is entitled to the rents only of the estate from the testator's decease." But now that I have threshed the matter out, I think that there is a good deal of truth in it; for in the case of real estate, if the estate produces nothing, the tenant for life can get nothing, whereas in the case of personalty he would get something upon the principle laid down in *In re Earl of Chesterfield's Trusts.* (2) Lewin and Jarman are, therefore, in accord with one another and, as it seems to me, with the authorities.

Some argument might be founded on the words of this particular will as shewing that the testator intended the tenant for life to have the rents and profits.

But I do not base my judgment upon the language of this particular will, but on the general principle that, where there is a trust for sale with a power to postpone which has been exercised, or where the sale without any impropriety has been postponed, the rents and profits of the real estate until sale are payable to the person who would be entitled to the income of the proceeds of sale.

I therefore give the general power of leasing asked by the summons, and approve the particular lease.

Solicitors for all parties: *Meredith, Roberts & Mills, for Baker & Co., Weston-super-Mare.*

(1) 5 Madd. 25; 21 R. R. 268. (2) (1883) 24 Ch. D. 643.

H. B. H.

BRIGHT *v.* RIVER PLATE CONSTRUCTION COMPANY.

COZENS-HARDY J.

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July 3.

[1900 B. 613.]

Arbitrator—Disqualification—Bias.

An arbitrator named in a reference is not disqualified merely because circumstances may exist or arise such as to cause a suspicion of bias.

A contract provided that all disputes arising thereout should be decided by a certain barrister. Disputes arose in which one party alleged misconduct, affecting fulfilment of the contract, on the part of the representative of a firm of solicitors. An action to stay arbitration before the barrister on the ground that he had intimate professional relations with the solicitors held untenable.

A TRIPARTITE agreement dated August, 1899, was made between the River Plate Construction Company, Limited, Messrs. Capel, stockbrokers, and the plaintiff Bright, relating to the negotiation by the plaintiff of a consolidation and extension of tramway concessions by the Buenos Ayres Municipality. The agreement provided :—

"Any dispute or difference that shall arise in respect of this agreement shall be referred to the decision of Mr. X. of the Chancery Bar or some other person to be nominated by him and the decision of the said Mr. X. or such person as he may appoint shall be final and binding on the parties hereto and neither party hereto shall be entitled to take any proceedings in any court of justice either in England or elsewhere in respect of any matter hereinbefore referred to except with the assent of the said Mr. X. or such person nominated by him as aforesaid except for the purpose of enforcing the decision of the said Mr. X. or his nominee. In the event of either party refusing to submit any such question as aforesaid to the said Mr. X. or his nominee the other party may submit same and the decision of the said Mr. X. or his nominee shall be binding on such defaulting party as if he had so submitted."

A dispute with reference to the agreement arose between the plaintiff and the other parties, which the latter referred to

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the arbitration of Mr. X. The plaintiff instituted an action to have the questions in dispute tried by the High Court, and to restrain proceedings before the arbitrator. That action came before his Lordship on cross-motions to stay the arbitration and to stay the action. His Lordship declared that the arbitration ought to proceed, and stayed the action, except so far as related to an application for a commission to take evidence in South America. In the meantime the arbitration proceeded, and three sittings were held. The plaintiff had now issued a writ in a new action against the River Plate Construction Company, Messrs. Capel, and the arbitrator, in which he claimed an injunction to restrain the defendants from proceeding with the arbitration on the ground of the alleged personal disqualification of the arbitrator.

The plaintiff moved in the second action for an injunction in terms of the claim till trial. The application was supported by an affidavit of the plaintiff in these terms:—

"1. At the date of the agreement whereunder the reference is now proceeding Messrs. Norton, Rose & Co. acted as solicitors for all parties thereto.

"2. One of the issues to be determined in the said reference is whether or not the failure (if any) of the plaintiff to obtain certain modifications of certain concessions to the reasonable satisfaction of the defendants within a time specified therein was not caused by the wrongful interference of one Z. as the duly authorized representative in South America of the said Norton, Rose & Co. the solicitors for the defendant company and the defendants James Capel & Co. This issue raises grave questions of misconduct on the part of the said Z. whilst acting as such representative of the said Norton, Rose & Co. The said Z. is and has been for some time past a member of the staff of the said Norton, Rose and Co.

"3. I have recently been informed and believe that Mr. X. has been for many years and still is at the present time in close professional relationship with the said Messrs. Norton, Rose & Co. and pending the arbitration is still rendering professional assistance in various matters. The said Messrs. Norton, Rose & Co. are and have been active and lucrative clients to the said

Mr. X., who constantly advises and acts on their behalf in relation to matters involving company law. I do not suggest that the said Mr. X. rendered any services in connection with the defendant company. I respectfully submit that the said Mr. X. cannot properly undertake to determine this issue of the alleged misconduct of the said Messrs. Norton, Rose & Co. The defendant company by its directors and the defendants James Capel & Co. have adopted the wrongful acts of the said Z. in South America and are seeking to take advantage thereof.

"4. I make no imputation whatever against the defendant X., but I submit that under the circumstances he ought not to act as arbitrator in the matter and that I ought to be relieved against his nomination made by the said Messrs. Norton, Rose & Co. at a time when they were acting on behalf of all parties and when no dispute involving their misconduct was in any way contemplated. In fact the name of Mr. X. was suggested by the said Z."

Micklem, Q.C. (*Methold* with him), for the arbitrator, during the course of reading the evidence, said the arbitrator had proceeded with the arbitration with no knowledge of the charges made against Mr. Z.; he had desired to leave himself in the hands of the parties and act as the Court directed; but, now certain statements had been put in evidence, he declined to proceed further.

Under these circumstances a fresh arbitrator agreed to by the parties was appointed, and the motion was argued on the question of costs. In the result the plaintiff was ordered to pay the costs.

Sir Edward Clarke, Q.C., and *Coldridge*, for the motion. The arbitrator is not in a position to hear the case without bias or embarrassment; the plaintiff was justified in endeavouring to stop the proceedings before the arbitrator, notwithstanding that he had been named by the parties; a matter which could not have been foreseen by the plaintiff has arisen

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since the appointment which will put the arbitrator in a false position; that takes the case out of the class of decisions where an undertaker's engineer has been appointed to determine questions between the undertaker and a contractor.

Eve, Q.C., *Hume-Williams, Q.C.*, and *MacSwinney*, for the River Plate Construction Company and Messrs. Capel. Where a person has been appointed arbitrator between parties by name, he is not disqualified from personal reasons, whether the reasons are or are not apparent at the time of his appointment, unless actual bias can be shewn: *Beddow* v. *Beddow* (1); *Jackson* v. *Barry Ry. Co.* (2); *Eckersley* v. *Mersey Docks and Harbour Board.* (3)

Sir Edward Clarke, Q.C., in reply.

COZENS-HARDY J. (after stating that the proceedings to obtain a commission were pending). After one or two hearings before the arbitrator, it is suggested that the arbitrator ought not to proceed, because he is a gentleman at the Bar having close and intimate professional relations with Messrs. Norton, and is therefore not a suitable or proper person to deal with a question involving charges against the firm or a representative of the firm. It is important to remember that it is not alleged in the affidavit that the arbitrator is in any way incompetent or unfair, or that he will be in fact in any way biased.

Now, as matter of strict law, I do not think I could accede to this application. I must adopt the principle laid down by the Court of Appeal in the two cases, *Jackson* v. *Barry Ry. Co.* (2) and *Eckersley* v. *Mersey Docks and Harbour Board* (3), which, of course, are binding on me. Those cases clearly distinguish between an arbitrator appointed by name and another person filling a judicial function. In *Eckersley* v. *Mersey Docks and Harbour Board* (3) the engineer of the harbour board had been nominated in a contract between the board and a contractor as the arbitrator in case of dispute as to the work contracted for. A dispute arose as to work superintended by

(1) (1878) 9 Ch. D. 89, 93. (2) [1893] 1 Ch. 238.
(3) [1894] 2 Q. B. 667.

the engineer's son, and the contractor alleged incompetency on the part of the engineer's son. It was held by the Court of Appeal unanimously that the engineer was not an improper person to act as arbitrator. No one in that case would have contemplated when the contract was made that there would be any difference between the contractor and the engineer's son. At the same time, no one would have thought the possibility of such a dispute a reason for not naming the engineer in accordance with custom. It was laid down that in case of a named arbitrator all those considerations which affect the qualification of a person who may be suspected, though unreasonably suspected, of bias in a judicial position must be laid aside, unless it can be shewn that the arbitrator has prejudged the case, or has actual bias. It follows that the plaintiff must pay the costs.

Solicitors: *Bennett & Co.; Norton, Rose, Norton & Co.; Gedge, Kirby & Millett.*

D. P.

In re MONEY KYRLE'S SETTLEMENT. MONEY KYRLE *v.* MONEY KYRLE.

[1900 M. 629.]

Tenant for Life—Possession—Term—Trust for Management and Accumulation—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7; *s.* 53; *s.* 58, *sub-s.* 1, *cls.* (vi.) (ix.).

A portion of family estates was subject to a term, created in 1868, in trustees to manage and apply the net income in paying off mortgages, on which large sums were still due. The Court put the tenant for life into possession of the land subject to the term, he giving security to pay the net income over to the trustees.

THE testator in this summons, William Money Kyrle, late of Homme House, Much Marcle, Herefordshire, died on August 27, 1868, having devised his real estate as to his estates in Wilts, certain estates in Herefordshire, and certain estates in Northamptonshire, to the use of trustees for a term of 500 years, and

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as to all his estates (but subject as to the estates comprised in the term to the trusts thereof) to the use of his brother Lieut.-Col. John Ernle Money Kyrle for life, and after his decease to the use of Audley Walter Washbourne Money Kyrle for life, with remainder to the use of the first and other sons of Audley W. W. Money Kyrle successively in tail male, with remainders over.

The testator declared the trust of the term of 500 years, that the trustees should permit the said John Ernle Money Kyrle to receive the first half-year's rent for his own use and benefit, and subject thereto should, "so long as the mortgage debt of 14,000*l.* now charged upon my messuages, closes, land, and hereditaments in the parish of Highworth, in the county of Wilts, commonly called the Upper Bury Town estate and the Lower Bury Town estate, and the mortgage debt of 16,000*l.* now charged upon other parts of my said hereditaments in the same county of Wilts, and on my hereinbefore-mentioned estates in the county of Northampton, or the interest thereof, or any part thereof, or any part of such principal monies respectively, shall remain unpaid or unsatisfied, manage the hereditaments for the time being subject to the said term of 500 years and receive the rents and profits thereof, and thereout in the first place pay and satisfy the costs and expenses of managing the same premises and keeping them in proper repair and condition, and pay and keep down the interest from time to time to become due on the said mortgage debts, or so much thereof as shall remain charged on the said hereditaments, and in the next place apply the surplus which after answering the purposes aforesaid shall remain of the said rents and profits in paying off and discharging the said mortgage debts of 14,000*l.* and 16,000*l.* respectively, and so as by means of the rents and profits of the said hereditaments comprised in the said term to exonerate and discharge the corpus of the same hereditaments from the said mortgage debts and interest respectively, and shall accordingly, if found necessary for the purposes aforesaid, accumulate the same rents and profits or any part thereof by investing the same and the subsequent annual produce thereof in or upon such stocks, funds, or securities as the moneys to

arise from the powers of sale hereinafter limited over the said demised hereditaments are hereinafter directed to be invested, and as opportunity shall offer convert and call in such accumulations or any of them, and apply the proceeds in or towards the discharge of the said mortgage debts of 14,000*l.* and 16,000*l.*, until by the ways and means aforesaid, or otherwise by means or out of the rents and profits of the said hereditaments, the said mortgage debts and the interest thereof shall be wholly paid and satisfied. And my will is that when and so soon as the said mortgage debts and the interest thereon and costs thereto, and generally all costs of and incidental to the execution of the trusts of the said term of 500 years should have been paid, the same term shall cease and determine." The testator gave the trustees power to cut and sell underwood and ashpoles, and directed them to apply the proceeds in the same way as rents and profits; he gave them power to lease for not more than seven years, power to sell with certain consents, and directed them to reinvest in land to be held on the like user with power to make interim investments.

Colonel Money Kyrle, the first tenant for life of the estates devised by the testator, died on October 29, 1894. The plaintiff in the summons, Audley Walter Washbourne Money Kyrle, was tenant for life in possession of such of the devised estates as were not comprised in the term of 500 years. The estates now subject to the term consisted of about 1400 acres in Wilts and 336 acres in Herefordshire. The Northamptonshire estates had been sold for 11,500*l.*, of which 10,175*l.* had been reinvested in the purchase of land in Herefordshire and Wiltshire. The plaintiff was tenant for life in possession of about 664 acres in Herefordshire under the testator's will. He was also tenant for life in possession of other family estates in Herefordshire comprising about 2000 acres, and the principal mansion, Homme House.

At the time of the death of the first tenant for life in 1894 the mortgage debts of 16,000*l.* and 14,000*l.* had been reduced to 10,000*l.* and 10,500*l.* There was also a mortgage of 1500*l.* on part of the Wilts estates. Since that time the two debts had been reduced to 9000*l.* and 8000*l.* The rents of the estates

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had fallen very much during the lifetime of the first tenant for life and had not risen.

The plaintiff resided at Homme House, and personally managed the family estates other than those comprised in the term of 500 years. He wished to have the management of the whole of the family estates in his own hands, to sell outlying parts, pay off incumbrances, and consolidate the property. The defendants to the summons were the present trustees of the term of 500 years and the plaintiff's infant son, the first tenant in tail in remainder by a guardian ad litem. The summons asked—(1.) A declaration that the applicant was tenant for life or had the powers of a tenant for life under the Settled Land Acts. (2.) A declaration that the proceeds of any sale by him under his statutory power was applicable in paying off incumbrances. (3.) That he might be let into possession of the lands subject to the term.

Northcote, for the applicant. The tenant for life under the circumstances is the natural and proper person to be in possession of and have the management of the whole estates. They can be better and more cheaply managed under one control. The Legislature has made him the sole person with power to sell. No lease could be granted without his consent. It is in his interest to improve and consolidate the property as a whole. In the case of *In re Richardson*, of which a full note is given in W. N. (1900) pp. 3, 4, Stirling J. put a tenant for life into possession under circumstances similar to those now before the Court in that the tenant for life had no immediate interest in the surplus income.

Ashworth James, for the tenant in tail in remainder. The object of the trusts of the term was to restore the family to its proper position; this object is best fulfilled by putting the tenant for life in possession of all the estates.

Eve, Q.C., and *Austen-Cartmell*, for the trustees. It is a matter of discretion for the Court to put a tenant for life into full possession. In most of the cases the tenant for life has been a person immediately interested pecuniarily in the amount of income, and the trustees have not been entrusted with

extensive powers of management: *In re Wythes* (1); *In re Bagot's Settlement* (2); *In re Newen.* (3)

[COZENS-HARDY J. *In re Richardson* (4) was a distinct advance on those cases.]

There the tenant for life had an annuity and the circumstances were peculiar. At any rate, the tenant for life ought to give security to pay the surplus rents over.

Northcote. The tenant for life is willing to give security.

COZENS-HARDY J. (after stating facts). Under these circumstances the plaintiff says he is the only person who can by law sell the property subject to the term. The land cannot be sold without him; it cannot be leased without him. The Legislature has given him the power to dispose of the land. It is therefore argued that he should be put into the actual receipt of the rents and profits, provided only that the persons interested in the term are not prejudiced, and the due administration of the trusts of the term is secured. I think there is much common sense in that view. In the case to which I have been referred (4) Stirling J. said: "Unless the applicant was let into possession it would be very difficult for him to exercise the powers which the Legislature had given him and of which he could not be deprived. He thought that the property could be most beneficially dealt with by letting the applicant into possession upon the condition of his performing the trusts of the term."

What Stirling J. said commends itself entirely to my judgment. I propose to follow the order there made with only one exception of importance. I gather that there must have been in that case some special circumstances that made Stirling J. think it unnecessary to require security. When I am asked to put two trustees who are accountable for the due application of the income out of possession and put a single individual into possession, I think I ought to require security from him for the due application of the surplus rents and profits. I propose to

(1) [1893] 2 Ch. 369.
(2) [1894] 1 Ch. 177.
(3) [1894] 2 Ch. 297.
(4) W. N. (1900) 3, 4; since fully reported, ante, p. 778.

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follow the order of Stirling J., and add that the tenant for life give security to the satisfaction of the judge in chambers that he will pay the surplus rents and profits of the lands subject to the term to the trustees, to be applied by them in accordance with the trusts of the term. The tenant for life will also pay an occupation rent of an amount to be settled by the judge in chambers in respect of tenements he may be in occupation of.

The order made was as follows:—

This Court doth declare that the plaintiff is a tenant for life of or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, over or in relation to the above-mentioned estates under the settlement thereof created by the will of the above-named testator William Money Kyrle and that the plaintiff is not precluded from exercising the powers of a tenant for life under the said Acts by reason of the term of 500 years limited by the said will to the trustees thereof in the said estates or some part thereof or by reason of the trusts declared of such term. And that the proceeds of sale of any land or houses sold by the plaintiff under the powers conferred by the said Acts or sold or to be sold by the trustees under the power of sale contained in the said will ought to be applied at the direction or option of the plaintiff in paying off the incumbrances upon the said estates and that when by such means or otherwise the two several mortgages of 16,000*l.* and 14,000*l.* in the said will mentioned shall have been fully discharged the said term of 500 years will cease and determine. And the plaintiff by his counsel undertaking in manner following namely (*a*) To insure and keep insured against loss or damage by fire in the names or name and to the reasonable satisfaction of the trustees or trustee for the time being of the said will all messuages or buildings upon the lands comprised in the said term of 500 years as may for the time being not be insured by the lessees or tenants thereof respectively in accordance with the provisions of their respective leases or agreements of tenancy (*b*) from time to time to execute in connection with all or any of such messuages or buildings such repairs as may be necessary or proper (*c*) to do all things which may be necessary or proper to keep such parts of the estates comprised in the said term as are for the time being unlet in a proper state of cultivation and not to cut down any timber or timberlike trees growing on any part of the estates comprised in the said term not required for repairs without the consent in writing of the said trustees or trustee (*d*) to pay all outgoings in respect of the said estates comprised in the said term and to keep down the interest on all charges or incumbrances thereon or any part thereof (*e*) to account on the 31st December, 1900, and on the 31st December in each succeeding year until further order to the said trustees or trustee for all receipts and payments in respect of the rents and profits of the said estates comprised in the said term and to pay over to them or him within one calendar month thereafter the balance appearing to be due from the applicants in such accounts (*f*) not to part with any policy of insurance effected as hereinbefore provided or any receipt for the payment of

any premium in respect thereof or any of the muniments of title hereinafter mentioned without the written consent of the said trustees or trustee upon all reasonable occasions (*g*) to permit the said trustees or trustee or their or his agents at all reasonable times to enter and inspect such parts of the estates comprised in the said term as may be in the possession of the applicant and from time to time to supply to the said trustees or trustee all such information as they or he may reasonably require with respect to the same (*h*) so long as the applicant remains in possession or receipt of the rents and profits of the estates comprised in the said term to keep the said trustees indemnified against any personal liability by reason of any covenant contract or obligation properly entered into or incurred by them as such trustees as aforesaid in connection therewith the said trustees so soon as they can supplying the applicant with information as to any such covenant contract or obligation and also by his counsel undertaking to pay such occupation rent (if any) for any lands comprised in the term of 500 years which may for the time being be in hand and unlet as the judge shall direct and forthwith to give security to the satisfaction of the judge for the performance of his undertaking to account for the rents.

This Court doth order that the plaintiff be let into immediate possession of the estates comprised in the said term. And it is ordered that such of the title-deeds relating thereto as are in the possession of the trustees be delivered up to the plaintiff. And it is ordered that the costs of the plaintiff and defendants of the said application be taxed by the taxing master. The costs of the defendants Charles Septimus Money Kyrle and Rowland Edmund Prothero to be taxed as between solicitor and client and be paid out of the sum of 1162*l.* 7*s.* 1*d.* in the hands of the trustees and any of the parties are to be at liberty to apply as they may be advised.

Solicitors: *Trower, Still, Freeling & Parkin; Routh, Stacey & Castle, for Phillips, Chippenham.*

D. P.

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Aug. 4, 7, 8, 11.

In re BARROW HÆMATITE STEEL COMPANY.

[1900 B. 052.]

Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26)—*Capital—Reduction—Available Assets—Goodwill—Reserve—Unappropriated Profits—Preference Shares.*

The Court will not confirm a reduction of capital unless satisfied that it will not work unjustly or inequitably.

Share capital comprised ordinary shares and shares carrying a fixed cumulative preference dividend, with no preference as to capital and no voting power. The Court refused to confirm a reduction on the ground (inter alia) that the reduction would benefit the ordinary shareholders at the expense of the preference shareholders.

In ascertaining the available assets of a company for the purpose of a reduction of capital, the amounts of reserve and unappropriated profit and the value of goodwill are to be taken into account.

On an opposed petition to confirm a reduction of capital the Court will not act on the balance of speculative expert evidence as to the value of mining property.

THIS was a petition for the confirmation of a reduction of capital that had been duly resolved on by the Barrow Hæmatite Steel Company, Limited.

The company was registered in 1864. Its share capital was originally 150,000*l.* divided into 100*l.* shares; it was from time to time increased and subdivided down to the year 1888. At the beginning of that year the share capital was 2,037,700*l.*, all paid up, divided into 150,000 ordinary shares of 10*l.*, 377 100*l.* preference shares bearing a cumulative dividend of 8 per cent., and 50,000 preference shares with a cumulative dividend of 6 per cent. The preference shares had and have no preference as to capital. The articles of the company then in force provided, and the articles now in force provide, that the holders of preference shares "are entitled to attend the general meetings of the company, but are not entitled by virtue of such shares to vote or interfere in any way in the company's proceedings, and are not by virtue of such shares eligible as directors of the company." The company, by virtue of special resolutions passed in 1885, had power to reduce its capital.

From 1882 down to the passing of certain resolutions to reduce capital in March and April, 1888, no dividends had been paid on the ordinary shares of the company, and some time previously to the passing of the resolutions the preference dividends had not been paid in full. Those resolutions provided for the reduction of the capital all round by one quarter, reducing the ordinary shares and the 6 per cent. preference shares from 10*l.* shares to 7*l.* 10*s.* shares, and the 8 per cent. preference shares to 75*l.* shares.

The petition to confirm that reduction came before North J., and the reduction was confirmed by him by an order made in August, 1888, notwithstanding the opposition of certain preference shareholders. (1)

At meetings of the company held respectively on November 24 and December 16, 1899, a special resolution was passed:—

"That the share capital of the company be reduced from 1,528,275*l.* divided into 150,000 ordinary shares of 7*l.* 10*s.* each, 377 8*l.* per cent. preference shares of 75*l.* each, and 50,000 6*l.* per cent. preference shares of 7*l.* 10*s.* each to 764,137*l.* 10*s.* divided into 150,000 ordinary shares of 3*l.* 15*s.* each, 377 8*l.* per cent. preference shares of 37*l.* 10*s.* each, and 50,000 6*l.* per cent. preference shares of 3*l.* 15*s.* each, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets to the extent of 3*l.* 15*s.* per share upon each of the 150,000 ordinary shares, 37*l.* 10*s.* per share upon each of the 377 8*l.* per cent. preference shares, and 3*l.* 15*s.* per share upon each of the 50,000 6*l.* per cent. preference shares of the company which have been issued, and are now outstanding, and by reducing the nominal amount of all the said ordinary shares from 7*l.* 10*s.* to 3*l.* 15*s.* each, and of all the said 8*l.* per cent. preference shares from 75*l.* to 37*l.* 10*s.* each, and of all the said 6*l.* per cent. preference shares from 7*l.* 10*s.* to 3*l.* 15*s.* each."

The articles provided that the declaration of the directors as to the amount of profits should be conclusive. For the last few years, the balance-sheet submitted by the directors had

(1) (1888) 39 Ch. D. 582.

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shewn a considerable profit, and the current preferential dividends had been paid; but there were accumulated arrears of those dividends not paid.

A balance-sheet of the affairs of the company as on December 31, 1898, and a profit and loss account for the year 1898, were submitted to the annual general meeting of the company held in March, 1899. The net profit for the year, after deducting interest on debentures and debenture stock, was shewn to be 65,803*l.* 7*s.* 3*d.* This, with a balance brought forward from the previous year, amounted to 71,602*l.* 18*s.* 3*d.*; and this sum stood on the debit side of the balance-sheet to the credit of profit and loss. The sum of 20,000*l.* also stood to the credit of reserve. The credit side of the balance-sheet contained items under the heading, "Land, buildings, works, fixed plant, and mining leases as per last balance-sheet." There was appended to the balance-sheet the following auditors' note: "Having duly examined the books and accounts to December, 1898, we find the same to be correct, and certify that the above balance-sheet exhibits a true and correct view of the company's affairs, subject to the fact that no depreciation has been written off the amounts at debit of land, buildings, works, fixed plant, and leases, and that the loss on certain properties sold during the year has not been written off. All expenditure on maintenance and repairs has been charged to revenue, and a further outlay on extensions and improvements is also proposed to be written off out of profits."

In accordance with the directors' recommendation, the amount to the credit of profit and loss was applied in defraying special expenditure in 1898 not chargeable to capital, in paying a dividend on the preference shares for the past year without discharging any arrears, in increasing the reserve account from 20,000*l.* to 40,000*l.*, and in carrying forward an undivided profit of 10,418*l.* 10*s.*

At the annual general meeting of the company held on March 22, 1900, a balance-sheet of the affairs of the company as on December 31, 1899, and a profit and loss account for the year 1899, were submitted. The net profit shewn was 89,018*l.* 17*s.* 6*d.* On the balance-sheet there appeared to the

credit of profit and loss, including the amount brought forward, 99,437*l.* 7*s.* 6*d.*, and to the credit of reserve 40,000*l.* On the credit side of the balance-sheet the items under the head, "Land, buildings, works, fixed plant, and mining leases as per last balance-sheet," were identical in description and amount with the items under that head in the previous balance-sheet, and an auditors' note similar to the note on the previous balance-sheet was appended.

The directors' report, which was adopted, contained the following recommendation to carry forward the whole amount standing to the credit of profit and loss: "The directors propose that this amount be carried forward, until the decision of the Court with respect to the application of the company for a reduction of its capital has been given. A further meeting will then be called to consider how the amount at the credit of profit and loss account should be disposed of."

The petitioners alleged and adduced evidence to prove that items standing on the credit side of the balance-sheet under the heading, "Land, buildings, works, fixed plant, and mining leases as per last balance-sheet," were depreciated to the extent that the capital was proposed to be written down.

The petition was opposed by a number of holders of preference shares to a very large amount, both on the ground that it was not shewn that the capital proposed to be written off was lost or not represented by available assets, and on the ground that there was no commercial necessity to reduce the capital, and that the proposed reduction would be inequitable and work unfairly against the preference shareholders and in favour of the ordinary shareholders. They adduced evidence to shew that the items alleged to be depreciated were, if depreciated, not depreciated to the extent alleged, and that other items, "Yorkshire colliery, coke ovens, and cottages," were appreciated and ought to be written up in the balance-sheet, and contended that in taking into account the available assets of the company for the purpose of reducing capital that the reserve fund and the amount standing to the credit of profit and loss ought to be taken into account. The other facts sufficiently appear in the judgment.

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Swinfen Eady, Q.C., and *Cassel*, for the petitioners. On the former application in this company it was decided by North J.—*In re Barrow Hæmatite Steel Co.* (1)—that as the preference shareholders have no preference as to capital, that in case a reduction takes place all the shares are to be reduced proportionately: *In re Quebrada Railway, Land and Copper Co.* (2) is to the same effect.

[COZENS-HARDY J. In case a reduction does take place, I think you are entitled to say that the reduction must be pari passu. But am I not entitled to take into account, in considering whether the reduction is to be confirmed, how it will work between the members? Was not the bargain with the preference shareholders, that so long as the company was a going concern they should get a certain dividend?]

The evidence shews that in fact not more than half the present nominal paid-up capital exists as available assets. It is the duty of the directors to see that the balance-sheet is true and accurate; it can only be made so by writing down the inflated items.

[COZENS-HARDY J. Is not your contention inconsistent with *Lee* v. *Neuchatel Asphalte Co.* (3), *Bolton* v. *Natal Land and Colonization Co.* (4), and that class of case?]

We admit that dividends may be declared notwithstanding that fixed capital is lost. But dividends ought to be paid in proportion to actual capital. It is not right that dividends should be paid on non-existing capital. The capital ought to be written down in the balance-sheet: *Verner* v. *General and Commercial Investment Trust* (5); *In re Kingston Cotton Mill Co.* (*No.* 2) (6); *In re National Bank of Wales.* (7)

It is asserted that something ought to be credited to goodwill. There is no goodwill. It is also raised as objection to the petitioners' figures that reserve and unappropriated profit ought to be considered as available assets: these are not capital; they are merely unappropriated income.

(1) 39 Ch. D. 582.
(2) (1889) 40 Ch. D. 363.
(3) (1889) 41 Ch. D. 1.
(4) [1892] 2 Ch. 124.
(5) [1894] 2 Ch. 239, 267.
(6) [1896] 2 Ch. 279.
(7) [1899] 2 Ch. 629.

Eve, Q.C., and *Kirby*, for persons holding preference shares and not ordinary shares; and

Hon. E. C. Macnaghten, Q.C., and *Simey*, for persons holding preference and ordinary shares, in opposition. On the evidence, no depreciation to justify a reduction of capital has been shewn. In estimating the amount of available assets, both the reserve and the amount of unappropriated profit ought to be taken into account: these are eminently available assets of the company. Nothing has been allowed for goodwill, which in a company of this description must have a considerable value.

Supposing the alleged loss of capital to be established, the effect of the proposed reduction, if carried out, will simply be to take out of the pockets of the preference shareholders, who had no voice in passing the resolution for reduction, dividends, and give them to the ordinary shareholders, who passed the resolution, in derogation of the original bargain they made. The Court will not willingly help to carry out such injustice. We submit that, if any reduction is considered proper, it would not be fair that the dividends on the preference shares should be reduced; if the capital is reduced, the preference rate of dividend should be increased. A reduction will not be confirmed unless the Court is satisfied that it will not operate unfairly: *British and American Trustee and Finance Corporation* v. *Couper* (1); *Lee* v. *Neuchatel Asphalte Co.* (2)

When the former petition came before North J., no dividend had been paid for some time on either class of shares: it was thought, in the then condition of authority on the point, that no dividend could be paid till either the lost capital was replaced out of profits—a contingency that seemed remote—or the capital was reduced. A large number of the preference shareholders naturally desired a reduction with an immediate prospect of some dividend. Since that time it has been decided that, where part of the fixed capital of a company has been lost, the company may pay dividends out of current profit.

In view of the state of the law as now recognised, there is no necessity for a reduction; the business can be and is being carried on vigorously and profitably; to reduce the capital

(1) [1894] A. C. 399. (2) 41 Ch. D. 1.

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would in no way affect the business of the company, or benefit the company looked on as a whole.

Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

Aug. 11. COZENS-HARDY J. This petition for reduction of capital raises several points of importance and difficulty. The company was incorporated in 1864. Its capital was from time to time increased, and in 1888 it was 2,037,700*l.*, divided into 150,000 ordinary shares of 10*l.* each, 377 8 per cent. preference shares of 100*l.* each, and 50,000 6 per cent. preference shares of 10*l.* each. The preference shares have no priority as regards capital, but are cumulative as to dividend, and the holders of these shares have no right of voting at meetings of the company. In 1888 the company resolved to reduce its capital rateably to the extent of 25 per cent. The petition seeking the confirmation by the Court came before North J. (1) It was there decided that the preference shareholders could not insist upon the reduction being confined to the ordinary share capital, and the Court confirmed the proposed reduction. The principle of this decision is binding upon me, and I think it is not open to me to regard some of the arguments I have heard on the present occasion.

The company now desire further to reduce their reduced capital by writing off 50 per cent. all round, and they have passed a special resolution for this purpose which they ask the Court to confirm. The petition is stoutly opposed by a very large body of preference shareholders. The precise number is not very important, but I take it that, putting aside shareholders who hold both ordinary and preference shares and who may, therefore, be indifferent to the change, the petition is opposed by a very large majority of the preference shareholders. It is alleged by the company, and it is necessary for the company to establish, that the 50 per cent. which they propose to cancel is "lost or unrepresented by available assets." Unless this is made out there is no jurisdiction to make the order. Assuming that the company can establish this, and that I have

(1) 39 Ch. D. 582.

power to sanction the reduction, I am guided in considering how my discretion ought to be exercised by the observations of Lord Herschell in *British and American Trustee and Finance Corporation* v. *Couper*. (1) It is not the duty of the Court to confirm unless it is satisfied that the reduction will not work unjustly or inequitably. Lord Herschell lays down this proposition: "No such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably." In other words, the change ought not to be sanctioned in a doubtful case.

It remains to consider these two points.

The case on the part of the company may be shortly stated as follows. They say that the iron ore mines stand in the balance-sheet at twice their value, and they propose to reduce it by, roughly, 177,000*l*. They say their works, which stand at upwards of 2,000,000*l*., are over-estimated by 486,000*l*., and that their freehold land and house property, which stands at 200,000*l*., is over-estimated by 100,000*l*. These three items make up the 764,000*l*. which they propose to write off. They support their contention by a mass of evidence. As to the first item, their expert evidence goes to shew the extreme probability that the iron ore which has been hitherto worked in a part of a large tract of land near their works is approaching exhaustion, and that there is no reasonable probability of further mines or veins being discovered. With reference to the second item, the works, the company say that although they are in a high state of efficiency and have been kept up in this state out of revenue, yet their value is really dependent upon the value of the adjacent mines, and that if ore has to be purchased and brought from a distance they will not be able to employ the works at so great an advantage. With reference to the third item, they say that by reason of subsidences and excessive prices paid to avoid claims for compensation and other causes the present value of land and house property is only 50 per cent. of the amount at which it stands in the balance-sheet.

On the part of the opponents there is also a great mass of

(1) [1894] A. C. 399, 406.

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evidence. In some respects it is not so direct or so weighty as that of the company. But the evidence as a whole leaves, in my mind, the impression that the value of the mines and of the works is really a pure matter of speculation, upon which no satisfactory or conclusive judgment can be formed. I think I might dispose of the petition on the short ground that the company have not satisfied me that items 1 and 2 are proved. Capital ought not to be reduced in an opposed case on the mere balance of speculative expert evidence. There are circumstances under which the Court is obliged to rely upon such evidence, but this is not such a case.

The opponents, in addition to challenging the figures in these three items, raise several further points. First, they say that among the assets of the company there is a sum of 40,000*l.* to the credit of reserve account which ought to be but has not been reckoned. They say that according to the articles of association of the company this sum is made applicable towards depreciation of this nature. Secondly, they say that there is a further sum of, roughly, 90,000*l.* to the credit of profit and loss, which is an available asset. Thirdly, they say that the goodwill of a company of this nature is an asset to which some value, and probably a considerable value, ought to be attributed: see *In re Abstainers and General Insurance Co.* (1) Fourthly, they further say that a colliery which is only valued at 175,000*l.* ought to be appreciated. On this point there is a mass of evidence on both sides. Most of the observations which I have made as to speculative expert evidence apply to this point. I am certainly not satisfied that the colliery is not worth much more than 175,000*l.* having regard to the present prices of coal, but I do not intend to base my judgment upon any such consideration.

Dealing, then, with the first three points made by the opponents, I can see no answer to the argument that the 40,000*l.* ought to have been treated as an available asset. So far as I am aware, this is the first instance in which a company possessing a large reserve fund has sought to reduce capital without taking account of the reserve fund. As to the 90,000*l.* to the credit

(1) [1891] 2 Ch. 124.

of profit and loss, the directors have not yet recommended any dividend, and it rests with them to consider whether all or any part of this sum ought to be placed to reserve account. Upon the whole, I think that similar observations apply to it. As to goodwill, it is no doubt true that the company never has entered goodwill as an asset. For the purposes of the company as a going concern there was no necessity for doing this; but, nevertheless, any goodwill must be regarded as an available asset for the purpose of a reduction petition. The decision of North J. above referred to is clear upon the point. I think, upon the balance of the evidence, that a company of this magnitude, whose goods are known almost all over the world by their particular brand, must have a goodwill of considerable value. For all these reasons I think that the company have not proved that 764,000*l.* is capital lost or unrepresented by available assets, and it follows that I cannot confirm the reduction.

I am unwilling to part with the case without stating that, even if the fact of the loss of 764,000*l.* had been established, I should not have thought it right to confirm the reduction. What is the necessity for the reduction? The company is making large and increasing profits from its trading. In round figures—1897, 55,000*l.*; 1898, 65,000*l.*; 1899, 89,000*l.*; probably more in the current year, having regard to the price of coal. It has paid, and, having regard to decisions which are binding upon every Court short of the House of Lords, it has properly paid, dividends out of such profits notwithstanding the loss of capital. Why should any change be made? The earning capacity of the company will not be in any way increased by the reduction of the capital, and I do not think that in dealing with two classes of shareholders I ought to make an unnecessary reduction for the avowed purpose of relieving the ordinary shareholders from the burden of preferential interest. At the present moment there are arrears of the cumulative preferential dividend, the whole or a greater part of which may be speedily paid off out of profits. The annual preferential charge is in round figures 24,000*l.*, subject to which all the profits go to the ordinary shareholders. The proposal is that the ordinary shareholders should in future take all the profits,

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subject to a preferential charge of 12,000*l.* only. In substance it is a proposal by the ordinary shareholders to deprive the preferential shareholders of 12,000*l.* a year for the benefit of the ordinary shareholders, without any necessity for so doing and without any advantage to the company as a whole. This does not strike me as fair and equitable. It seems to have been assumed in 1888 that some reduction of capital was necessary, and the fight raged over the mode in which this reduction should be effected. None of the decisions to which I have referred had then been given, and probably all parties, including counsel and the judge, may have been under the impression that no dividend could legally be paid unless and until lost capital had been replaced. This view was widely held until the Court of Appeal in *Lee* v. *Neuchatel Asphalte Co.* in 1889 (1) and *Verner* v. *General and Commercial Investment Trust* in 1894 (2) laid down that a trading profit may be applied in payment of dividends notwithstanding a depreciation in the fixed capital of the company. This is an important matter for consideration in all cases where there are several classes of shareholders who may be unequally affected by reduction. Where all shareholders rank alike, both as to dividends and as to capital, it is of less importance, for nobody can be hurt by reduction.

I have not forgotten the argument that directors ought to keep true and honest accounts. Of course they ought. I see no reason to suppose that they have not done this in the past, or that they will not do it in the future. They have not stated that the items in question represent present or actual value. On the contrary, the balance-sheets which they have published state that the figures as to the three items in question are given "as per the last balance-sheet," with a note by the auditors that no depreciation has been written off. If the directors are minded to change this system and to reduce the figures, and to add a fresh balancing item under the head of depreciation, they can do so. Nothing that I have said will prevent them from taking this course. But the decisions to which I have referred necessarily imply that directors may

(1) 41 Ch. D. 1. (2) [1894] 2 Ch. 239.

honestly and properly prepare a balance-sheet shewing or implying a loss of capital, and at the same time may honestly and properly prepare a loss and profit account shewing a balance available for dividend.

The result is that I must dismiss the petition, and the company must pay the costs of the opponents.

Solicitors: *Currey, Holland & Co.; Walker & Pettitt.*

D. P.

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JACOBS *v.* REVELL.

[1899 J. 1826.]

Vendor and Purchaser—Conditions of Sale—Clause excluding Compensation—Misdescription—Specific Performance—Possessory Title.

The defendants sold by auction to the plaintiff a freehold property described in the particulars of sale as containing 5A. 0R. 26P., and as bordering on a lake on S. Common, the sale being subject to conditions of sale, one of which was as follows: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise . . . . and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof."

The only part of the property to which a good title was shewn contained 4A. 3R. Another part of the property offered for sale bordered on the lake, and as to this the only title offered was what purported to be a title by possession for less than forty years.

The plaintiff claimed rescission of the contract and a return of the deposit paid by him, and the defendants counter-claimed for specific performance:—

Held, that even if the defendants had established a possessory title to the border land for twelve years, that would not have been sufficient, as the contract, so far as it related to that land, was an open one, in which case a forty years' title by possession was required; that the defendants were not entitled to specific performance in respect of the part of the property to which a good title had been shewn; and that the plaintiff was entitled to rescission of the contract and the return of his deposit.

The authorities as to compensation conditions reviewed.

On June 21, 1899, the defendants offered for sale by public auction a freehold residential and building estate, known as Shortwood House and Grounds, at Staines, in the county of Middlesex, described in printed particulars of sale and on a plan, and subject to conditions of sale annexed to the particulars.

The plaintiff was the bidder for and was declared the purchaser of the property at the price of 1920*l.*, and paid down to the auctioneers a deposit of 192*l.*, and he and the auctioneers—the latter as agents for the defendants—signed an agreement

dated June 21, 1899, annexed to the particulars, whereby the plaintiff acknowledged himself the purchaser of the property described in the particulars and delineated on the plan at the price of 1920*l*.

The particulars were addressed "to land speculators" and builders, and on the first page thereof the property was described as follows: "A valuable freehold residential and building estate adjoining and overlooking Shortwood Common, known as Shortwood House and Grounds. The property comprises a substantial residence with stabling and outbuildings, with kitchen garden, orchard, and meadow, the whole covering an area of about 5A. 0R. 26P." On the second page of the particulars the above description was repeated substantially, and it was also stated that "The residence may be left standing in well-secluded grounds, and the remaining portion be made available for sub-division in plots and the creation of ground-rents." Then followed the plan, which is further referred to below, and on the third page of the particulars there was a statement that "The grounds are well matured and prettily arranged, with selected shady walks through shrubberies bordering the fine sheet of ornamental water on Shortwood Common."

Clause 5 of the conditions of sale was as follows: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise, and is sold subject to all rights of way and other easements (if any) affecting the same, and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof."

On the plan there was a note, as follows: "This plan is intended for the information of intending purchasers, and to shew the position of the property, and, although believed to be correct, its accuracy is in no way guaranteed."

In the plan the property was uniformly coloured pink up to the margin of the ornamental water.

The abstract of title was furnished to the plaintiff's solicitors, and on July 3, 1899, they sent in certain objections and

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requisitions, in which they took (amongst others) the objections that title was shewn to only 4A. 3R., and that no title was shewn to a square piece marked in the plan with a square mark on it, at the south-east corner and adjoining the lake, and that this was not shewn on a conveyance of September 29, 1870, forming part of the title adduced.

The defendants answered that this statement was denied, and that the square piece was an integral part of the property.

The plaintiff declined to complete the sale, and requested the defendants to return his deposit, and on their declining to do so he commenced the present action, alleging (amongst other things) in his statement of claim that the defendants had shewn no title to considerable portions of the land bordering on the lake and coloured pink on the plan, and that those portions entirely separated the property from Shortwood Lake and were part of Shortwood Common; and he claimed rescission of the agreement for sale and a return of his deposit.

By their defence the defendants did not admit that they had shewn no title to the portions said to separate the property from Shortwood Lake, and alleged that the whole of the land coloured pink formed part of the premises known as Shortwood House and Grounds, and that they and their predecessors in title had been in sole and undisputed possession and receipt of rent since the date of the conveyance of September 29, 1870. They also alleged that the property to which they shewed title contained 5A. 0R. 26P., or thereabouts, and that if the particulars contained any such misdescriptions as were alleged, but not admitted, the same were not serious or material, and that the plaintiff was debarred by condition 5 from relying on the misdescriptions; and they counter-claimed for specific performance and payment of the balance of purchase-money with interest.

At the trial Buckley J. found that certain portions of the land coloured pink, including a strip running along the lake, were not comprised in the deed of September 29, 1870, which formed the root of title, and that the acreage of the property was only 4A. 3R.; that one Wallace, through whom the vendors claimed, and who had purchased the property in 1870, had

lived there till 1897, and had from time to time, from 1880 to 1884, added the strip above mentioned to the property by way of encroachment; but that about 1884 or 1885 the local board had noticed what was going on, and had driven posts into the ground shewing the true boundary of the property; that these posts were put up while Wallace was away, and retained notwithstanding his objections, and that it was hopeless to contend that the line of posts did not shew the true boundary.

Astbury Q.C., and *R. B. Yardley*, for the plaintiff. The first question is whether only the land inside the line of posts belonged to Wallace, or whether he had a good title to the land beyond the line and down to the lake. The defendants have, it is submitted, no title to the land between the posts and the lake as against the lord of the manor, and cannot keep the commoners off it.

If that contention holds good, there is such a material misdescription as entitles the plaintiff to rescission of the contract and to recover his deposit, and condition 5 does not free the defendants from responsibility as to the misdescription, or entitle them to specific performance. A condition in that form only applies to trivial errors.

H. Terrell, Q.C. and *J. Tanner*, for the defendants. The Court must in each case consider whether the misdescription is or is not so great that but for it the contract would not have been entered into: *Flight* v. *Booth* (1); *Whittemore* v. *Whittemore* (2); *M'Queen* v. *Farquhar* (3); Fry on Specific Performance, 3rd ed. pp. 554, 579.

[BUCKLEY J. referred to p. 548 of the same book, and *Astbury, Q.C.*, to Dart's Vendors and Purchasers, 6th ed. p. 158.]

A condition excluding the right to compensation is not to be confined to trivial and immaterial descriptions: *In re Terry and White's Contract.* (4)

(1) (1834) 1 Bing. N. C. 370; 41 R. R. 599.
(2) (1869) L. R. 8 Eq. 603.
(3) (1805) 11 Ves. 467; 8 R. R. 212.
(4) (1886) 32 Ch. D. 14.

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[BUCKLEY J. referred to *In re Fawcett and Holmes* (1), where there was a condition allowing compensation.]

In the case of either sort of condition the misdescription must be material, or the condition does not apply.

As to what is a material description, we rely on the observations of Tindal C.J. in *Flight* v. *Booth*. (2) *In re Arnold* (3) is not in point.

The defendants have a possessory title to the strip of land round the lake, and it is immaterial that the title is not shewn until after action brought: *Games* v. *Bonnor* (4); and the defendants are entitled to an inquiry as to title as directed in that case.

The defendants and their predecessors in title have been in possession of the strip for over twelve years, and it is now unnecessary to shew that the possession has been adverse. Their title is complete as against both the lord of the manor and the commoners: *Attorney-General* v. *Tomline*. (5)

A purchaser cannot recover his deposit in the absence of misrepresentation on the part of the vendor: Dart's Vendors and Purchasers, 6th ed. p. 116: *Nicoll* v. *Chambers*. (6)

[They also referred to *In re Scott and Alvarez's Contract* (7); *Brewer* v. *Brown* (8); Seton on Judgments, 5th ed. vol. iii. p. 1858.]

Astbury, *Q.C.*, in reply. The plaintiff is entitled to a return of his deposit: *Bain* v. *Fothergill* (9); Dart's Vendors and Purchasers, 6th ed. p. 116. There was no misrepresentation or breach of contract in *In re Scott and Alvarez's Contract*. (7)

There was no offer of a possessory title until after the plaintiff had repudiated, and the contract was therefore at an end: *Salisbury* v. *Hatcher* (10); Dart's Vendors and Purchasers, 6th ed. p. 1178.

In re Arnold (3) shews that the misdescription is a material one. And see *Heywood* v. *Mallalieu*. (11)

(1) (1889) 42 Ch. D. 150.
(2) 1 Bing. N. C. 370; 41 R. R. 599.
(3) (1880) 14 Ch. D. 270.
(4) (1884) 33 W. R. 64.
(5) (1880) 15 Ch. D. 150.
(6) (1852) 11 C. B. 996.
(7) [1895] 2 Ch. 603.
(8) (1884) 28 Ch. D. 309.
(9) (1874) L. R. 7 H. L. 158.
(10) (1842) 2 Y. & C. Ch. 54.
(11) (1883) 25 Ch. D. 357, 364.

If the plaintiff is entitled to rescind, he is entitled to a return of his deposit: *Nottingham Patent Brick and Tile Co.* v. *Butler.* (1) *Games* v. *Bonnor* (2) is an exceptional case.

A possessory title cannot upon an open contract be forced upon a purchaser, and forty years' possession must always be proved: *Douglass* v. *London and North Western Ry. Co.* (3) The Statute of Limitations does not begin to run against the lord of the manor until he is dispossessed: *Ecclesiastical Commissioners for England* v. *Parr* (4); *In re Lidiard and Jackson's and Broadley's Contract.* (5) [He also referred to *Bowman* v. *Hyland* (6); *Bellamy* v. *Debenham.* (7)]

Cur. adv. vult.

Aug. 8. BUCKLEY J. At a sale by auction on June 21, 1899, the plaintiff became the purchaser of the property in question for 1920*l.*, and signed a contract and paid a deposit of 192*l.*, the conditions of sale containing a clause as follows: [His Lordship read condition 5, and continued:—]

Before dealing with the other facts of the case, I will state what I conceive to be the law applicable to a case of this kind. The plaintiff seeks rescission and the return of his deposit. The defendants counter-claim for specific performance. There is a condition excluding compensation. That is the class of case with which I have to deal.

I find that in *Knatchbull* v. *Grueber* (8), which was the case of a bill filed by a vendor for specific performance with an allowance to the defendant by way of compensation for a part of the estate to which the plaintiff was unable to make a good title, Lord Eldon says: "This Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have." And in *In re Arnold* (9) both James L.J. and Bramwell L.J. cited that passage, and expressed a hope that the Court would continue in that course.

(1) (1886) 16 Q. B. D. 778.
(2) 33 W. R. 64.
(3) (1857) 3 K. & J. 173.
(4) [1894] 2 Q. B. 420.
(5) (1889) 42 Ch. D. 254.
(6) (1878) 8 Ch. D. 588.
(7) [1891] 1 Ch. 412.
(8) (1817) 3 Mer. 124, 146; 17 R. R. 35.
(9) 14 Ch. D. 270, 279, 284.

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At the root of cases of this class lies the decision of Tindal C.J. in *Flight* v. *Booth*. (1) That was an action by a purchaser to recover his deposit—a purely common law action. The principles which the Court applied were purely principles of law, and the Chief Justice, after referring to some of the decided cases as to misdescription, and stating that there was a discrepancy between them, said (2): "We think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale." In that case there was a condition which provided that if "any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way." (3) The Chief Justice was dealing, therefore, with a case in which there was a stipulation for compensation. The present case, therefore, is a stronger one in favour of the purchaser, for it is obviously easier to arrive at the conclusion that the meaning of the contract is that the purchaser shall be compellable to take less land and to have money for the deficiency than that he is to take less than he bargained for and have no compensation. Even where there is a condition for compensation you must, according to *Flight* v. *Booth* (1), consider whether the purchaser has got the subject-matter which he agreed to buy. If he does not get what he contracted to buy, he may be entitled to say that he will not have

(1) 1 Bing. N. C. 370; 41 R. R. 599.

(2) Ibid. 377.

(3) [This statement in the report of *Flight* v. *Booth* is taken from a special award made under an order of reference. The exact words of the condition are nowhere given.—F. P.]

compensation for it. A fortiori when he is excluded from compensation.

The next case is *Portman* v. *Mill*. (1) That was a case in which the vendor sought specific performance. There was a contract to purchase a farm containing 349 acres or thereabouts, be the same more or less. In fact, the farm consisted of only a certain number of customary acres, being less than the number of statute acres stated by 100 acres or upwards. There was a stipulation that the parties should not be answerable or accountable for any excess or deficiency in the quantity of the premises, and that such excess or deficiency (if any there should happen to be) should not vacate or affect the contract, but that the premises should be taken at the quantity stated, whether more or less. Compensation was therefore excluded. Lord Eldon says (2): "As to the stipulation in the contract—that the parties shall not be answerable for any excess or deficiency in the quantity of the land, and that the premises shall be taken at the quantity before stated—I never can agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here." Here I touch upon the question as to how far a trivial or substantial error makes a difference. The condition is not confined to trivial errors; nevertheless, if you get to a point such as that in *Flight* v. *Booth* (3), that the purchaser cannot get what he contracted to buy, the vendor cannot enforce specific performance.

The next case—*Whittemore* v. *Whittemore* (4)—was a case of a sale in a suit, and it came on upon an application by a purchaser at a sale under the decree. He was not seeking specific performance; the facts were as if the vendor were seeking specific performance. The property was stated in the particulars to contain 753 square yards or thereabouts, and was found to contain only 573 square yards or thereabouts. One of the conditions of sale provided that if any error, misstatement, or omission in the particulars should be discovered, it should

(1) (1826) 2 Russ. 570; 26 R. R. 175.
(2) 2 Russ. 574.
(3) 1 Bing. N. C. 370; 41 R. R. 599.
(4) L. R. 8 Eq. 603.

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not annul the sale, nor should any compensation be allowed in respect thereof. Malins V.-C. held that the condition applied only to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation. In other words, in a vendor's action to enforce specific performance, if the property he offers to convey so differs from that which he offered to sell as that there is a substantial difference within the decision in *Flight* v. *Booth* (1), the vendor cannot enforce specific performance.

In *Cordingley* v. *Cheeseborough* (2) the purchaser sought for specific performance with an abatement of the purchase-money. The contract contained a clause that the admeasurements were presumed to be correct, but that if any error was discovered therein no allowance should be made or required either way. The clause, therefore, excluded compensation; but the purchaser, alleging that he was getting less than he contracted to buy, asked for specific performance with compensation. He wanted to buy upon altered terms. The Court decreed specific performance without compensation. Lord Westbury L.C. says: "In deciding this question it must be recollected exactly what is the nature of the present suit. It is not the suit of a vendor seeking to enforce a specific performance. It is the case of a purchaser coming for a specific performance, but insisting that he is entitled by virtue of the contract to a deduction from his purchase-money." In other words, he was insisting on something which was not in the contract.

In re Terry and White's Contract (3) does not throw much light on the general question. In that case there was a clause excluding compensation; but the purchaser nevertheless asked for compensation. The vendor was not willing to give compensation, and under another condition he annulled the sale, and it was held that he was right in so doing. Lindley L.J. says (4): "In all actions for specific performance, and in all applications to the Court involving the exercise of that discretion which the Court invariably does exercise in ordering or

(1) 1 Bing. N. C. 370; 41 R. R. 599.
(2) (1862) 4 D. F. & J. 379, 384.
(3) 32 Ch. D. 14.
(4) 32 Ch. D. 27.

refusing specific performance, it is necessary not to confound the principles or rules by which contracts are interpreted, with the principles or rules which guide the Court in enforcing or declining to enforce specific performance. I should not have thought it necessary to allude to so very obvious a caution, if some of the arguments addressed to the Court had not apparently called for it. For example, it was contended that such conditions as the third condition in this case only applied to comparatively trivial and unimportant errors, misstatements, and misdescriptions, and several cases were referred to in support of that proposition. But when those cases are carefully looked at they will not be found to warrant so general a statement. The proposition is only true in certain classes of cases." The classes of cases to which his Lordship there refers are those in which a vendor is seeking to force upon a purchaser what he did not contract to buy. He was dealing with the equitable grounds for refusing specific performance. He continues (1): "*Portman* v. *Mill* (2) was a vendor's action, and Lord Eldon's observations must be taken with reference to such actions. *Whittemore* v. *Whittemore* (3) was a case in which the purchaser did not seek specific performance, but, on the contrary, resisted it unless compensation was made." Lower down he says: "In the present case the purchaser not only does not seek to be discharged from the contract, but he insists on his right to take the property at a price less than the contract price. It may be that he would be entitled to do so if the terms of the contract were different from those to which he has in fact agreed. The question is whether he can do so consistently with those terms. In my opinion he cannot."

Going back to *In re Arnold* (4), where there was a condition excluding compensation except such, if any, as the judge in chambers should direct, the property was held to be so substantially and materially different from what was offered for sale that the purchaser resisting completion was entitled to be relieved from the contract. James L.J. says (5): "It has

(1) 32 Ch. D. 29.
(2) 2 Russ. 570; 26 R. R. 175.
(3) L. R. 8 Eq. 603.
(4) 14 Ch. D. 270.
(5) 14 Ch. D. 279.

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never been held that a man is obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he bought." Bramwell L.J. says (1): "The purchaser's objection then is, that you cannot give me the thing I bought, and it is admitted that they cannot, and in my opinion there ought to be an end of the matter." Then he refers to the passage in Lord Eldon's judgment which I have read, and says: "That is what I humbly venture to think should be the rule, and I trust that this case will be a step further in that direction."

The last case to which I will refer is *In re Fawcett and Holmes* (2), in which there was a clause allowing compensation. It was an appeal by a purchaser from an order of North J. in chambers overruling objections to title. Lord Esher says (3): "It is contended on the one side that the condition applies, however great the error may be; it is contended on the other side that the condition only applies where the error is trifling. I think that neither view is right." In one class of cases the error may be immaterial; but if the vendor comes to enforce specific performance, he cannot succeed if what he offers to convey is substantially different from what he offered to sell. Further on he says (4): "If there had been no compensation clause the Court would have had to deal with the case according to the inherent powers of a Court of Equity, but here the case is within the terms of a contract into which the parties have entered, and the Court must compel the purchaser to fulfil it." And in the same case Cotton L.J. refers to *Flight* v. *Booth*. (5)

In that state of the law, what I have to look to is this. The purchaser says, as in *Flight* v. *Booth* (5), "Pay back my deposit," and, as in *In re Arnold* (6), "relieve me of my contract." The vendors then rely on condition 5, but *Flight* v. *Booth* (5) and *In re Arnold* (6) are an answer to them if the misdescription is substantial. [His Lordship then stated the facts, and continued as follows:—]

(1) 14 Ch. D. 284.
(2) 42 Ch. D. 150.
(3) Ibid. 156.
(4) 42 Ch. D. 157.
(5) 1 Bing. N. C. 370; 41 R. R. 599.
(6) 14 Ch. D. 270.

I arrive at the conclusion of fact that the property which the vendors offered for sale was property a material part of which they had not got. The purchaser says that if he had known that those parts of the property were not included in the sale he would not have purchased. Therefore he is right, and is entitled to rescind.

Another defence set up was that the vendors had a good possessory title, but that defence fails by reason of what the local board did in 1885. They marked out the true boundaries of the property. Wallace was always entitled to go over the boundaries of his land on to the lake and the common, and when doing so he was not exercising possessory rights. Moreover, this being an open contract so far as these outlying parts are concerned, a possessory title must be shewn, not for twelve years only, but for forty years. Under these circumstances the plaintiff is entitled to succeed. I must declare that the purchaser is entitled to rescind the agreement, and I order it to be delivered up to be cancelled, and the deposit to be returned with interest at 4 per cent. The defendants must pay the costs of the action, and I dismiss the counter-claim with costs.

Solicitors for plaintiff: *F. W. & H. Hilbery.*
Solicitor for defendants: *Aris Tickner.*

F. E.

WRIGHT J.
1900
Oct. 25.

In re CHARTERLAND STORES AND TRADING COMPANY.

[00312 of 1900.]

Company—Winding-up—Affidavit in Support of Petition—Defect or Irregularity—Companies Winding-up Rules, 1890, *rr.* 36, 177 (1.).

Where a petition for winding-up is presented by an individual and not by a company, the affidavit in support, referred to in rule 36 of the Companies Winding-up Rules, 1890, cannot be made by the petitioner's manager; and non-compliance with the rule by filing only an affidavit by a person not by the rule authorized to make the affidavit cannot be waived by the Court as a "formal defect" or an "irregularity" within the meaning of rule 177 (1.).

A PETITION praying that the Charterland Stores and Trading Company, Limited, might be ordered to be wound up was presented by Julius Weil, a creditor of the company, who was a merchant carrying on business at No. 1, Gresham Buildings, Basinghall Street, in the City of London.

The affidavit filed in verification of the petition was made by Bernard Felix Foran, who in the affidavit stated that he was the manager in London of the business carried on by the petitioner; that the petitioner also carried on an extensive business at Port Elizabeth in Cape Colony, Bechuanaland, and other places in South Africa, and was himself then engaged in South Africa; that such of the statements in the petition as related to the acts and deeds of the petitioner were, to the deponent's knowledge, true; and that such of the statements as related to the acts and deeds of any other person or persons he believed to be true.

In a subsequent affidavit Foran stated that he carried on the petitioner's business in London under the authority of a power of attorney; and that by that power he was, amongst other things, authorized to commence, prosecute, and enforce all actions and legal proceedings touching the business and affairs of the petitioner, and to deal with such proceedings as he might think fit; that on September 26, 1900, he received a

cablegram from the petitioner instructing him, amongst other things, to take the present proceedings; and that in virtue of those instructions and the power of attorney he made the affidavit.

J. F. Waggett, in support of the petition.

Mulligan, Q.C., and *J. W. M. Holmes*, for the company. There is a preliminary objection that the petitioner has not filed such an affidavit as is required by rule 36 of the Companies Winding-up Rules, 1890. Under that rule, unless the petitioner is a company, the affidavit required by the rule must be made by the petitioner himself. Moreover, material statements in the affidavit are based on information and belief, and cannot, therefore, be admitted in support of any proceedings which are not interlocutory.

J. F. Waggett. If the affidavit is defective, the irregularity may be cured by the Court under rules 176 and 177 (1.) of the Rules of 1890. [He also referred to *In re Carrara Marble Co.* (1)]

Mulligan, Q.C., in reply. Rule 36 is imperative in requiring evidence to be given by certain specified persons. Non-compliance with the rule is not a mere irregularity within rule 177 (1.). The prescribed statutory evidence is in all cases required, and the Court has no power to dispense with it: *In re St. Davids Gold Mining Co.* (2)

[He was stopped by the Court.]

WRIGHT J. Of the two objections taken on behalf of the company, one is bad and the other good. The objection which is bad is that a material part of the affidavit filed in support of the petition is based on information and belief.

The other objection is purely technical, but I cannot pass over it.

Rule 36 of the Companies Winding-up Rules, 1890, prescribes the persons by whom and by whom alone the affidavit verifying the petition may be made, and it says that "such affidavit shall be made by the petitioner, or by one of the

(1) W. N. (1896) 87.

(2) (1866) 14 W. R. 755.

WRIGHT J.
1900
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petitioners, if more than one, or in case the petition is presented by a company by some director, secretary, or other principal officer thereof." The rule is explicit in its terms; and as the petitioner in this case is not a company, I cannot hold that an affidavit made by the petitioner's manager, although he is authorized by a power of attorney to take proceedings, is made, within the words of the rule, "by the petitioner, or by one of the petitioners, if more than one," or discharges the obligation imposed by the rule. The rule lays it down absolutely that, except in the specified case of a company being petitioner, the petitioners or one of them must make the statutory affidavit. I cannot see how I can put the matter right under the powers conferred on the Court by rule 177. Sub-clause 1 of that rule says that "no proceeding under the Acts shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court." In my judgment, these words are not wide enough to include the present case. There is here no question of proceedings being invalidated; the question is, What evidence does the Court require? The case is, however, obviously one in which an opportunity ought to be given to the petitioner of putting the matter right. I will, therefore, give liberty to the petitioner to amend his petition if so advised by adding another person as co-petitioner, and extend the time for filing the statutory affidavit until the last day of the present sittings on which I take petitions. The petition must stand over until then.

Solicitors for petitioner: *Hollams, Sons, Coward & Hawksley.*
Solicitors for company: *Ingle, Holmes & Sons.*

F. E.

In re DUKE OF ST. ALBANS. LODER *v.* DUKE OF ST. ALBANS.

STIRLING J.
1900
Aug. 2, 7, 9.

[1900 S. 1154.]

Revenue—Estate Duty—Settlement Estate Duty—Incidence—Contingent Legacy—Contingent Annuity—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 7, 9, 14, 22—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

The testator by his will gave certain legacies and annuities, some of which were contingent upon the legatees and annuitants attaining the age of twenty-one. He directed that every legacy and annuity should be primarily payable out of his personalty, and charged his real estate in aid, but not in exoneration, of his personalty with the same, if the personalty should be insufficient. He devised his real estate to the use of his eldest son for life with remainders over. He declared that if his residuary personalty should be insufficient for payment of his funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits, and not by raising a capital sum to provide for the same; and he charged the residuary personalty with the payment of the legacies and annuities, and directed that the ultimate residue of the personalty should be invested and should follow the limitations of the real estate. After the testator's death the executors had paid settlement estate duty in respect of the contingent legacies and annuities. There was a probability that the personal estate would be insufficient to pay the funeral and testamentary expenses, legacies, and annuities. The question having arisen as to how the settlement estate duty ought to be borne as between the residuary estate and the legatees and annuitants:—

Held, (1.) that the contingent legacies must be treated as settled, and, having regard to the decision in *In re Maryon-Wilson*, [1900] 1 Ch. 565, the duty must be borne by the legatees; and (2.) as regarded the annuities, that the decision in *Attorney-General* v. *Owen*, [1899] 2 Q. B. 253, applied to the personalty, and consequently the annuitants must bear their proper proportion of the settlement estate duty in accordance with the rule laid down in *In re Parker-Jervis*, [1898] 2 Ch. 643.

THIS was an originating summons taken out by the trustees and executors of the will of the late Duke of St. Albans for the determination of certain questions which had arisen as to the incidence of the estate duty and the settlement estate duty which had been paid in respect of certain portions of the estate.

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The testator by his will, dated December 18, 1896, gave to his daughter Lady Sybil Beauclerk and to his son Lord Osborne Beauclerk respectively certain legacies and annuities.

He further gave the sum of 5000*l.*, which was to bear interest at 4 per cent. from his death, to his trustees upon trust for investment as therein mentioned, and to stand possessed of the said sum of 5000*l.*, or the investments representing the same and the income thereof, in trust for his son Lord William Beauclerk, if he should attain the age of twenty-one years. He also gave to his son Lord William, contingently on his attaining the age of twenty-one years, an annuity of 300*l.* to commence from the day of the testator's death, or the day of his son's attaining the age of twenty-one years, whichever should last happen. He also gave a legacy and an annuity to his daughter Lady Alexandra Beauclerk, contingently upon her attaining the age of twenty-one years or marrying.

He directed that every annuity given by his will should be considered as accruing from day to day, but should be payable quarterly, and that every legacy and annuity thereinbefore given should be primarily charged upon and payable out of his personal estate other than chattels and effects specifically given; but if his personal estate other than as aforesaid should be insufficient for payment thereout of his funeral and testamentary expenses and debts, to pay and provide for all such legacies and annuities, then he charged all his real estates subject to any charges which might affect the same respectively at his death in aid, but not in exoneration, of his personal estate other than as aforesaid with the said legacies and annuities; and he authorized the deficiency, if any, to be raised and provided for in manner thereinafter mentioned. He devised all his real estates to his trustees and their heirs during the life of his eldest son without impeachment of waste upon certain trusts therein mentioned, with remainders over. He declared that in case his residuary personal estate should be insufficient to pay his funeral and testamentary expenses and debts and the legacies and annuities given by his will or any codicil to it his trustees or trustee might, notwithstanding any of the uses and trusts thereinbefore limited or to be limited

under any of the powers therein contained of his real estates and in priority thereto, but subject to any lease made under any statutory power in such behalf, raise by mortgage of the same premises or any of them upon such terms as his trustees or trustee might think fit any money which they or he should deem requisite to make up the amount by which his residuary personal estate should be insufficient to pay his funeral and testamentary expenses, debts, legacies, and annuities, but so that the annuities should be paid as they became due out of rents and profits, and not by raising a capital sum to provide for the same, and upon any such mortgage might appoint the hereditaments so to be mortgaged as therein mentioned. The testator gave all the residue of his personal estate not thereinbefore disposed of, including any leasehold premises, unto his trustees upon trust to call in, sell, and convert the same into money, and to apply the net proceeds thereof in or towards paying or providing for his funeral and testamentary expenses and debts, and the legacies and annuities thereinbefore given, and to apply the surplus, if any, as if it had arisen from a sale of part of his Bestwood estate and other hereditaments thereinbefore devised under the statutory power of sale conferred by the Settled Land Act.

The testator died on May 10, 1898. At that date both Lady Alexandra and Lord William Beauclerk were infants, and Lord William had not yet attained the age of twenty-one years. During his life the testator had upon the respective marriages of some of his daughters covenanted to pay certain sums of money and annuities. These principal sums were still unpaid, and the trustees of the various settlements were made defendants to this summons.

It appeared that there was a probability that the testator's personal estate would be insufficient to provide for the payment of the debts and the legacies and annuities given by the will.

The executors had paid out of the personal estate the estate duty and settlement estate duty on various portions of the estate, and in particular they had paid the settlement estate duty in respect of the contingent legacies and annuities bequeathed

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by the will. In assessing the value of the residuary personalty the Inland Revenue authorities had deducted the legacies vested at the death of the testator, but not those which were contingent, and they had made no allowance in respect of the annuities.

The following questions (inter alia) were asked by the summons:—

1. Whether any, and if any, which of the legatees or annuitants under the will ought to bear any, and if any, what part of the estate duty payable in respect of the general personal estate bequeathed by the said will.

2. Whether any, and if any, which of the legatees or annuitants under the will ought to bear any, and if any, what part of the settlement estate duty payable under the will so far as related to the personal estate.

3. Whether any, and if any, which of the legatees or annuitants under the will or otherwise entitled to charges on the real estate thereby settled ought to bear any, and if any, what part of the estate duty or settlement estate duty payable in respect of the real estate.

4. Whether, in respect of the interest on a legacy of 10,000*l.* by the will given to Lord Osborne Beauclerk, and on a sum of 10,000*l.* covenanted to be paid to the trustees of the settlement executed on the marriage of Lady Louise Loder, and in respect of an annuity of 400*l.* covenanted to be paid to the trustees of the settlement executed on the marriage of Lady Moyra Cavendish, any, and if any, what sums should be deducted or retained for estate duty or settlement estate duty, and, if so, out of what part of the testator's estate.

J. I. Stirling, for the executors and trustees of the will.

Butcher, Q.C., and *Austen-Cartmell*, for the Duke of St. Albans. Upon the first question we admit that the estate duty in respect of legacies, so far as the same are payable out of the personalty, is payable by the executors out of the general personal estate: *In re Webber*. (1)

Upon the second question we submit that the contingent

(1) [1896] 1 Ch. 914.

legatees must bear their proportion of the settlement estate duty chargeable in respect of the residue of the personalty.

No doubt, in *In re Webber* (1) North J. held that what was true of estate duty was also true of settlement estate duty. That, however, was put right by s. 19 of the Finance Act, 1896, which threw the burden of the settlement estate duty upon the legacy or other personal property settled by the will of the deceased.

It may, no doubt, be said that the contingent legacies were not, strictly speaking, settled legacies within the meaning of s. 19 of the Act of 1896. But, assuming this to be so, the principle of *In re Maryon-Wilson* (2) applies.

The legacies form part of the settlement in effect created by the direction in the will that the residue of the personalty shall be invested and follow the limitations of the realty. The fact that the contingency under which the property is settled may never arise is immaterial: *Attorney-General* v. *Fairley.* (3) The view taken in that case of s. 5 of the Finance Act, 1894, has since been confirmed by s. 14 of the Finance Act, 1898, which provides for the repayment of settlement estate duty which has been paid in respect of property settled upon a contingency which has not arisen and cannot arise. The same view was also taken in *Attorney-General* v. *Clarkson* (4) in the case of a testator who died before the commencement of the Act of 1898.

With regard to the annuities, where capital sums have been appropriated to meet settled annuities, settlement estate duty is payable in respect of the same on the death of the settlor: *Attorney-General* v. *Owen.* (5) In practice the settlement estate duty is charged upon the whole of the residue whether there has been a sufficient appropriation or not. An annuity payable out of income and corpus is primarily payable out of income: *Walker* v. *Martineau.* (6)

As to the proportion of the settlement estate duty to be paid by the annuitant, the principle laid down in *In re Parker-*

(1) [1896] 1 Ch. 914.
(2) [1900] 1 Ch. 565.
(3) [1897] 1 Q. B. 698.
(4) [1900] 1 Q. B. 156.
(5) [1899] 2 Q. B. 253.
(6) (1883) 31 W. R. 703.

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Jervis (1), with reference to annuities payable out of real estate, applies by analogy to personal estate. According to the principles laid down in that case the annuitant is only liable for the interest upon the proportion of the duty attributable to that part of the estate of which he is ex hypothesi tenant for life. This view is supported by the reasoning upon which the decision in *In re Maryon-Wilson* (2) is founded.

The remaining questions are covered by the decision in *In re Parker-Jervis* (1) and s. 14, sub-s. 1, of the Act of 1894. The sums payable to the trustees of the settlements, although they are debts, must not be deducted from the value of the estate for the purpose of assessing the estate duty: s. 7, sub-s. 1. Those sums, and also the legacies and annuities charged on the real estate in case the personalty is deficient, must bear their proper proportion of the estate duty and the settlement estate duty.

Howard Wright, for Lord William Beauclerk and Lady Alexandra Beauclerk. My clients are not chargeable with any portion of the settlement estate duty either with regard to the legacies or the annuities. At the death of the testator neither of them had taken any interest in the estate at all, and it was not certain that they ever would. There is no authority binding them to contribute to the settlement estate duty, which is not payable in respect of contingent legacies. The material section of the Act of 1894 is s. 5, sub-s. 1, which deals with property settled by the will of the deceased. In order to constitute a settlement, property must be given to or in trust for any persons by way of succession: s. 22 (*h*) (*i*), which incorporates s. 2 of the Settled Land Act, 1882. Here no doubt parts of the estate were settled, but it was not certain that the annuitants would ever take any interest. If the infant never takes, which is possible, no person can ever take in succession to him.

Both in *Attorney-General* v. *Clarkson* (3) and *Attorney-General* v. *Fairley* (4) there was obviously a settlement, and neither of those cases affects the position of these defendants. *Attorney-*

(1) [1898] 2 Ch. 643.
(2) [1900] 1 Ch. 565.
(3) [1900] 1 Q. B. 156.
(4) [1897] 1 Q. B. 698.

General v. *Clarkson* (1) only decided that, having regard to the Finance Act, 1898, which was passed in consequence of the decision in *Attorney-General* v. *Fairley* (2), it must be taken that the latter case was rightly decided. *Attorney-General* v. *Owen* (3) only goes to this—that where settlement estate duty is payable, it is payable out of the whole mass of the property, and that any person who takes an interest must contribute.

In *In re Maryon-Wilson* (4) the duty was clearly payable, the only question being as to its incidence as between the owners of the particular settled fund and those entitled to the general estate, having regard to what was decided in *In re Webber*. (5)

Ingle Joyce, for Lord Osborne Beauclerk and the trustees of the settlements of the testator's married daughters. There is no question of contingency so far as these defendants are concerned. In *Attorney-General* v. *Owen* (3) a capital sum was set apart for the payment of the annuity, and subject thereto it was given to another person. Here, the personalty may be insufficient, and the value of the annuities must be ascertained. The personalty will then be apportioned between the legatees and annuitants, the deficiency being thrown upon the real estate. It must be admitted that the annuities are payable out of rents and profits so far as they cannot come out of the personalty, so that to that extent a portion of the estate may be said to be settled within *Attorney-General* v. *Clarkson*. (1) As regards the portion of the annuity which is charged on the real estate, no doubt *In re Parker-Jervis* (6) would apply, and the settlement estate duty is payable, but so far as the annuity is payable out of the personalty the duty is not chargeable.

Butcher, Q.C., in reply. The settlement estate duty is payable on the fund which produces the annuity, and not on the annuity itself. It does not matter whether a fund is appropriated or not to the payment of the annuity, or whether the annual payments are to be made out of capital or income.

(1) [1900] 1 Q. B. 156.
(2) [1897] 1 Q. B. 698.
(3) [1899] 2 Q. B. 253.
(4) [1900] 1 Ch. 565.
(5) [1896] 1 Ch. 914.
(6) [1898] 2 Ch. 643.

STIRLING J. Here the property is clearly settled on a contingency, and the principle of *Attorney-General* v. *Owen* (1) applies.

1900

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STIRLING J. (after stating the facts). As to the first question, it is admitted that the estate duty cannot be charged on any of the legacies or annuities—none of them are under any liability to bear that.

It was on the second question that the most serious part of the argument arose. It is said that there is a probability, if not a certainty, that the personal estate will be insufficient for payment of the debts, funeral and testamentary expenses, and legacies and annuities. The question which is put to me is as to the incidence of the settlement estate duty which has been actually paid by the executors. They were required by the Crown to pay it, and have paid it. There is nothing in the evidence directed to shew that the executors acted improperly in making that payment. They did not see fit to contest the right of the Crown, which was based upon the decisions in certain cases which may or may not be distinguishable from the present. Under those circumstances, it seems to me that upon this occasion I must assume that the settlement estate duty was properly paid by the executors. If any person on whom the settlement estate duty falls desires to say that the executors acted improperly, or that any further steps ought to be taken with respect to the settlement estate duty which has been already paid, for the purpose of recovering it or otherwise, it will be for that beneficiary to indicate his wishes, and then it will be considered whether any steps ought or ought not to be taken; but, for the purposes of the present decision, I must take it that the settlement estate duty was properly paid, and that all I have got to do is to decide how, as between the residuary estate and the legatees and annuitants, that settlement estate duty, or the appropriate portion of it, is to be borne.

That being so, it seems to me that I must hold that the contingent legacies are to be treated as settled, the duty having been claimed and paid on that footing; and, that being

(1) [1899] 2 Q. B. 253.

so, the settlement estate duty must be borne by the legatees in accordance with the decision of the Court of Appeal in *In re Maryon-Wilson.* (1) Again, as regards the annuities, it appears to me that it must be taken that the decision in *Attorney-General* v. *Owen* (2) applies to the personalty; and consequently that the annuitants must bear the proper proportion of the settlement estate duty, in accordance with the rule laid down in the case of *In re Parker-Jervis.* (3)

As to the third question, there was really no contest; it was admitted that under the statute the legatees and annuitants entitled to charges on the real estate settled by the will must bear the estate duty and the settlement estate duty.

As to the last question, it seems to me to be quite clear that whatever has to be borne by any legatee or annuitant may be deducted generally from anything which is payable to that legatee or annuitant in respect of his legacy or annuity.

That, I think, disposes of the whole case.

Solicitors for all parties: *Freshfields.*

(1) [1900] 1 Ch. 565. (2) [1899] 2 Q. B. 253.
(3) [1898] 2 Ch. 643.

G. A. S.

WRIGHT J.
1900
Nov. 2, 7,

In re NORTH WEST ARGENTINE RAILWAY COMPANY.

[00324 of 1900.]

Company—Winding-up—Surplus Assets—Distribution not according to Legal Rights—Implied Term in Resolution—Shareholders—Powers of Majority.

The A. Company, with a capital of 550,000*l.* divided into shares of 10*l.* each, of which 35,000 were preference shares and 20,000 were ordinary shares, and with articles of association which were silent as to how the surplus assets were to be divided between the two classes of shareholders in the event of winding up, entered into an agreement, under a power in its memorandum of association, to sell its undertaking and assets to the C. Company.

Part of the consideration for the sale was a sum of 310,000*l.* stock of the C. Company, which was to be distributed among the holders of the preferred and deferred shares of the A. Company, and accepted by them in satisfaction of their interests in the property sold; and the agreement was expressed to be conditional on all necessary resolutions of the shareholders of the A. Company being passed.

The agreement was silent as to the proportions in which the stock was to be divided between the two classes of shareholders, and so was the notice convening a meeting of the shareholders to pass a resolution approving the agreement and authorizing the directors of the A. Company to carry the same into effect. A circular sent by the secretary of the A. Company with the notice stated that the purchase consideration to the shareholders of 310,000*l.* stock was to be distributed among them in the proportion of 210,000*l.* to the preferred shareholders, and 100,000*l.* to the deferred shareholders. This suggested mode of distribution was referred to at the meeting, where it was also pointed out that the suggested mode was not in accordance with the legal rights of the two classes of shareholders in a winding-up. There were absentees from the meeting, and only a majority of the shareholders present voted for the resolution.

Held, that the Court could not (as it had done in *Somes* v. *Currie*, (1855) 1 K. & J. 605, and *In re Beeston Pneumatic Tyre Co.*, W. N. (1898) 34; 14 Times L. R. 338) draw an inference from the facts that all the parties concerned had agreed upon a mode of distribution not in accordance with the legal rights of the two classes of shareholders, and that, unless successful proceedings could be taken against the A. Company or its directors, or to set aside the resolution, or all individual consents of shareholders could be obtained, the liquidators must distribute the 310,000*l.* stock in accordance with the legal rights of the shareholders.

THE North West Argentine Railway Company, Limited (below called "the Argentine Company"), was registered in

1886, under the Companies Acts, 1862 to 1883, with a capital of 550,000*l.* divided into 55,000 shares of 10*l.* each, of which 35,000 were preference shares, described in the memorandum of association as being "subject to a preference dividend and other rights, as provided by the articles of association," and the other 20,000 shares were described in the memorandum as being "deferred shares with such rights as are declared in the articles of association." The memorandum of association gave power to amalgamate with another company, and to sell the company's undertaking, business, and property. Clauses 5, 6, and 7 of the articles were as follows:—

"5. The holders of the preferred shares shall be entitled to a cumulative preferential dividend at the rate of 7*l.* per cent. per annum on the amount for the time being paid or credited as paid up on the preferred shares held by them respectively, and if in any year the net profits shall be insufficient to pay the same, the holders of the preferred shares shall be entitled to have the deficiency made up out of the net profits of any subsequent year or years.

"6. The holders of the deferred shares shall be entitled to a cumulative dividend at the rate of 7*l.* per cent. per annum on the amount for the time being paid or credited as paid up on the deferred shares held by them respectively, and if in any year the profits available for dividends as hereinafter defined shall be insufficient to pay the same, the holders of the deferred shares shall, subject to the rights of the holders of the preferred shares, be entitled to have the deficiency made up out of the profits available for dividend of any subsequent year or years.

"7. The surplus profits shall be divided among the members in proportion to the amounts paid or credited as paid on the shares held by them respectively."

The articles were silent as to how the assets were to be distributed among the shareholders in the event of the company being wound up.

All the preferred and deferred shares were issued, and either paid up or credited as paid up.

By an agreement dated July 20, 1899, and made between

WRIGHT J. 1900 NORTH WEST ARGENTINE RAILWAY, *In re.*

the Argentine Company of the one part and the Cordoba Central Railway Company (below called "the Cordoba Company") of the other part, it was agreed that the Argentine Company should transfer and the Cordoba Company should take over the undertaking of the Argentine Company, including all its business, railway works, rolling stock, equipment, stores, lands, buildings, hereditaments, goods, chattels, and other property, assets, and effects. Part of the consideration for the transfer was an undertaking by the Cordoba Company to discharge the liabilities of the Argentine Company (other than the moneys owing or secured by certain debenture stock and certain arrears of dividend), and to indemnify the Argentine Company in respect thereof.

As a further part of the consideration, the Cordoba Company was to pay the costs and expenses of winding up and dissolving the Argentine Company. And the residue of the consideration was a sum of over 1,000,000*l.*, which was to be satisfied by certain stock to be distributed among the holders of debenture stocks of the Argentine Company, and 310,000*l.* Cordoba Central Railway Income Debenture Stock (Central Northern Section) to be distributed among the holders of the preferred and deferred shares of the Argentine Company, such stocks to be accepted by the debenture stock and share holders in full satisfaction and discharge of their rights and interests in the undertaking agreed to be transferred. The agreement was expressed to be made upon the conditions—(*a*) that all necessary resolutions had been passed by the shareholders of the Argentine Company, and (*b*) that all necessary resolutions had been passed and consents obtained from its stockholders and others. The resolutions and consents (*b*) were duly obtained. The agreement was silent as to the proportions in which the 310,000*l.* stock was to be divided between the two classes of the shareholders of the Argentine Company.

On July 17, 1899, the secretary of the Argentine Company, by order of the board of its directors, gave notice to the shareholders that an extraordinary general meeting would be held on August 10, 1899, when the resolutions subjoined would be proposed, and that should the resolutions be passed by the

required majority they would be submitted for confirmation as special resolutions to a second extraordinary meeting which would be subsequently convened. The proposed resolutions were as follows:—

"1. That the agreement submitted to this meeting and expressed to be made between" the two companies, "providing for the transfer of the company's undertaking and assets to the Cordoba" Company "in exchange for 310,000*l.* Cordoba Central Railway Income Debenture Stock (Central Northern Section), be and is hereby approved, and that the directors be and they are hereby authorized to carry the same into effect accordingly.

"2. That with a view to the distribution among the shareholders of their proportion of the purchase price provided for by the said agreement in manner therein provided, the company be wound up voluntarily, and that the following gentlemen, being the directors of the company, viz. [here followed their names and descriptions] be appointed liquidators for the purposes of such winding-up."

With the notice the following circular, headed with the name of the Argentine Company and signed by the secretary, was sent to the shareholders:—

"Sir or Madam,—In pursuance of the expression of opinion given by the shareholders at the annual general meeting, held on the 17th of May last, the board have sealed and exchanged the ad referendum agreement providing for the transfer of this company's undertaking and assets to the Cordoba Central Railway Company, Limited, provided the approval of this company's debenture-holders and shareholders is obtained to the terms of the transfer. I enclose herewith a notice convening an extraordinary general meeting to consider the proposal, and also send an epitome of the agreement, so that you may have time to consider the terms of the transaction before the meeting. I shall be happy to produce a full copy of the agreement to you, here, should you desire to inspect it. You will observe that the purchase consideration to the shareholders is 310,000*l.* Cordoba Central Income Debenture Stock, which, at the wish of the Cordoba Central Railway Company, Limited, is to be distributed among the shareholders in the following proportions,

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viz., 210,000*l.* to the preferred shareholders, and 100,000*l.* to the deferred shareholders."

At the meeting on August 10, 1899, A. Young and N. Spens, the receivers and managers in a debenture-holder's action against the Argentine Company, were called upon to address the meeting, and the former in his speech pointed out that if the company came to a winding-up the sum of 210,000*l.* stock offered to the preferred shareholders would be in excess of the amount to which they were legally entitled, and that the legal proportions payable to the preferred and deferred shareholders respectively would be 197,000*l.* to the former, and about 112,000*l.* or 113,000*l.* to the latter, both classes taking share and share alike.

On a show of hands the chairman declared that the first resolution had been carried by twenty-two hands to sixteen; but a poll was then demanded, and directed to remain open for a week.

When the chairman proposed to put the second resolution to the meeting, an amendment was moved—"That with a view to the distribution among the shareholders of their proportion of the purchase price provided for by the said agreement in manner therein provided, the company be wound up voluntarily."

A poll was again demanded and directed to be taken, and the meeting was adjourned until August 18, 1899, when the chairman declared the result of the polls to be as follows:—

As to resolution 1—	
In favour	30,728
Against	11,462
As to resolution 2—	
In favour	30,720
Against	11,462

He also declared that he had been advised that the first resolution, although not passed by a three-fourths majority, was sufficient, as a special resolution was not required, but that the second resolution required a three-fourths majority, and was therefore lost. It was subsequently withdrawn unanimously.

On August 17, 1899, the secretary of the Argentine Company, by order of the board of its directors, gave notice to all the shareholders that an extraordinary general meeting of the company would be held on August 29, 1899, when the resolution subjoined would be proposed. The resolution set out was in precisely the same terms as the resolution (1.) which had been passed at the former meeting.

This notice was accompanied by a circular, in which it was stated that the 350,000*l.* preference shares were to be exchanged for 210,000*l.* Cordoba Central, &c., stock, and that 200,000*l.* deferred shares were to be exchanged for 100,000*l.* like stock. The circular also stated as follows: "These"—namely, the deferred shares—"have equal capital rights with the preferred shares, and, looking at the strength of their legal position, the apportionment of 100,000*l.* income bonds appears to afford a fair settlement of their claims."

At the meeting the chairman explained that it was required because an informality had been discovered in the notice of the previous meeting, inasmuch as only an ordinary and not a special resolution was there required. He also said that the plan was that the preference shareholders should receive 210,000*l.* in income bonds, and that the deferred shareholders should receive 100,000*l.* in income bonds. The resolution was proposed and seconded.

One of the directors said he was advised that the proposed resolution was illegal, inasmuch as it could not be carried by a bare majority.

Five persons present voted for and five persons against the resolution. The chairman gave his casting vote for the resolution and declared it to be carried, and no poll was demanded.

By a special resolution of the Argentine Company, passed and confirmed at meetings held on December 18, 1899, and January 4, 1900, it was resolved that the company should be wound up voluntarily, and that A. Young and N. Spens should be appointed liquidators.

The liquidators took out an originating summons under s. 138 of the Companies Act, 1862, asking for directions as to

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how and in what proportions the 310,000*l.* stock was to be distributed as between the preferred and deferred shareholders of the Argentine Company. An affidavit of the liquidators stated that the agreement was in course of being completed and carried into effect, and that the income debenture stock was ready to be distributed and divided among the holders of the preferred and deferred shares.

The summons was adjourned into court, and was heard before Wright J. on November 2, 1900.

Whinney (*Swinfen Eady, Q.C.* with him), for the liquidators, stated the facts, and submitted the question raised for the decision of the Court.

Jenkins, Q.C., and *Kirby*, for the preferred shareholders. In the face of the circulars and what was said at both meetings, it cannot be asserted that either the shareholders who were absent or those who attended the meetings had not full notice that the 310,000*l.* was proposed to be distributed between the two classes of shareholders in the proportion of 210,000*l.* stock to the holders of preferred shares, and 100,000*l.* to the holders of deferred shares; and in the circumstances the Court is asked to draw the inference that all the shareholders of both classes assented to the distribution proposed. In *In re Beeston Pneumatic Tyre Co.* (1) this Court held that *Somes* v. *Currie* (2) was an authority warranting the Court in inferring an arrival by the shareholders at an unwritten agreement for a mode of distribution different from that prescribed by the articles of association.

The only difference between the *Beeston Case* (1) and the present case is that here the articles are silent, and the rights of the shareholders as regards the surplus assets are defined by law. When shareholders allow the position of parties to be changed without interfering, the Court will infer that they have consented to what is proposed to be done.

Eve, Q.C., and *Peterson*, for the deferred shareholders. The agreement itself does not say how the 310,000*l.* is to be divided between the two classes of shareholders, nor does the resolution

(1) W. N. (1898) 34; 14 Times L. R. 338. (2) 1 K. & J. 605.

in terms provide for distribution in the manner pointed out. But, even if the resolution is to be read as containing an implied term that the preferred shareholders are to have 210,000*l.* stock and the deferred shareholders 100,000*l.* stock, in exchange for their respective shares, that resolution does not bind shareholders who were either absent from the meeting or who did not assent to the resolution. The resolution would be merely an illegal attempt by a majority to bind a minority to accept less than they were legally entitled to: *Griffith* v. *Paget* (1), followed by the Court of Appeal in *Simpson* v. *Palace Theatre.* (2) Assuming that *In re Beeston Pneumatic Tyre Co.* (3) was correctly decided, it does not follow that because the Court in that case was enabled to draw a certain inference of fact, the same inference of fact is to be drawn here.

Jenkins, Q.C., in reply. It is admitted that a majority cannot overrule a minority so as to alter legal rights. The Court is not asked to so decide; it is only asked to infer that all the shareholders consented. If the Court cannot go so far as that, we ask for an inquiry as to the consents actually given. [He referred to *Evans* v. *Smallcombe.* (4)]

Cur. adv. vult.

Nov. 7. WRIGHT J. There is no doubt that in this case the resolution for adopting the agreement with the Cordoba Company would not have been passed but for the positive representation contained in the Argentine Company's circular that the stock which is in question was to be distributed in the manner therein suggested. The suggestion in the circular is in these words: "You will observe that the purchase consideration to the shareholders is 310,000*l.* Cordoba Central Income Debenture Stock, which, at the wish of the Cordoba Central Railway Company, Limited, is to be distributed among the shareholders in the following proportions, viz., 210,000*l.* to the preferred shareholders and 100,000*l.* to the deferred shareholders."

(1) (1877) 5 Ch. D. 894.
(2) (1893) 69 L. T. 70, 72.
(3) W. N. (1893) 34; 14 Times L. R. 338.
(4) (1868) L. R. 3 H. L. 249.

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On the faith of that representation a sufficient number of the preference shareholders either voted for the resolution or abstained from voting against it; and, as against those who adopted and took the benefit of that representation, effect ought, if possible, to be given to it. It seems, however, impossible on the present application to make an order or declaration affecting the shareholders collectively. In *Somes* v. *Currie* (1) and in *In re Beeston Pneumatic Tyre Co.* (2) there were facts from which an inference was drawn that all the parties concerned had agreed upon a principle of distribution. In the present case there is no room for such an inference. The resolution did not purport to give effect to the representation; it was not unanimously passed; the majority had no power to bind the minority in this respect; not much more than half of the shareholders were represented at the meeting; and no consent or equity can be suggested as against the dissentients or the absentees.

But then it is argued that individual deferred shareholders who took part in supporting the resolution are bound by the representation contained in the company's circular. It is difficult to see the ground of the contention. The circular was not theirs; they made no representation, collectively or individually. Nor would it be practicable to discover by an inquiry which of the deferred shareholders who voted had any knowledge of the representation. If there is any remedy, I think it must be in another Court or by a different proceeding—a proceeding against the company or the directors or to set aside the resolution. The liquidators must give to the resolution as it stands its legal effect, unless the resolution itself can be set aside.

It has not been suggested that any one wishes it to be set aside, nor could any proceedings for that purpose have much prospect of success, for the transfer to the Cordoba Company has been completed, and no equity arises as against them. All that I can do is to sanction some delay in the distribution of the stock, so as to give an opportunity to the preferred

(1) 1 K. & J. 605. (2) W. N. (1898) 34; 14 Times L. R. 338.

shareholders to ask for consents from individual deferred shareholders to the distribution of the assets, so far as their individual interests are concerned, according to the scheme suggested in the circular; and an opportunity to consider whether any other proceedings can be taken with any prospect of success.

[His Lordship declared that the stock was to be distributed among the shareholders according to their legal rights.]

Solicitors for liquidator: *Slaughter & May.*
Solicitors for preferred shareholders: *Ward, Bowie & Co.*
Solicitor for deferred shareholders: *E. A. Leadam.*

F. E.

END OF VOL. II.

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Stockbrokers had two accounts with their bankers—a current account and a loan account. The brokers became defaulters on the Stock Exchange on January 13, and were on January 24 adjudicated bankrupts. At the time of their stoppage there was on the current account a balance of 1362*l.* 10*s.* to their credit, and a balance of 7500*l.* was due from them to the bankers on the loan account. They had deposited with the bankers as security bonds and shares belonging to some of their clients. This deposit was made without the authority of the clients, but the bankers did not know that the deposited securities were not the property of the brokers. The deposit was made (as the Court of Appeal held, differing in this respect from Byrne J.) to secure the general indebtedness of the brokers to the bankers, and not merely their indebtedness on the loan account. After the stoppage of the brokers the bankers realized the deposited securities, the proceeds of which were, together with interest until sale, more than sufficient to cover the balance due on the loan account, and there remained in their hands a sum exceeding the credit balance on the current account:—

Held, that the two accounts must be treated as one, and that it was the duty of the bankers to apply the 1362*l.* 10*s.* due from them on the current account in reduction of the 7500*l.* due to them on the loan account, and to use the deposited securities to satisfy only the difference between those two balances:

Held, therefore, that the sum remaining in the bankers' hands belonged to the owners of the deposited securities.

Two days before the stoppage of the brokers a client had sent them a cheque to pay for some stock which they had purchased for him. This cheque was paid to their current account, and the amount of it formed part of the 1362*l.* 10*s.* The purchase was not completed by the brokers:—

Held, that the client had no equity as against the owners of the deposited securities to be repaid the amount of his cheque out of the 1362*l.* 10*s.*

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Held, that members who had given notices of withdrawal which expired before the commencement of the winding-up were entitled to be paid in full in priority to those whose notices had matured later, or who had given no notice at all:

Held, also, that the executor of a member who had died before the winding-up was entitled to priority over withdrawing members.

A member who had given notice of withdrawal, afterwards accepted from the society a loan upon terms whereby he still continued to receive interest upon his share, but paid interest upon his advance:

Held, that he was not entitled in the winding-up to set off the amount of his share against the unpaid balance of the loan. *In re* COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY. DAVIS *v.* NORTON - Stirling J. 819

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—— *Pursell, Ex parte*, (1887) 34 Ch. D. 646, followed - - - - 731
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—— *Reg.* v. *Midland Ry. Co.*, (1887) 19 Q. B. D. 540, distinguished - - - 352
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—— *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685, 690, questioned - - - 373
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—— *Rigby* v. *Connol*, (1880) 14 Ch. D. 482, followed - - - - 605
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—— *Roberts, In re*, (1885) 30 Ch. D. 234, distinguished - - - - 525
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—— *Russell, Cordner & Co., In re*, [1891] 3 Ch. 171, distinguished - - - 254
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—— *Santley* v. *Wilde*, [1899] 2 Ch. 474, explained and distinguished - 445
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—— *Seroka* v. *Kattenburg*, (1886) 17 Q. B. D. 177, approved of - - - 585
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—— *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, followed and applied - - 196
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—— *Stillman* v. *Weedon*, (1848) 16 Sim. 26, considered - - - - 332
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—— *Swaine* v. *Wilson*, (1889) 24 Q. B. D. 252, discussed - - - - 605
See TRADE UNION.

—— *Tapley* v. *Eagleton*, (1879) 12 Ch. 683, considered - - - - 620
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—— *Weatherall* v. *Thornburgh*, (1878) 8 Ch. D. 261, not overruled by *Wharton* v. *Masterman*, [1895] A. C. 186 - 541
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—— *West Hartlepool Ironworks Co., In re*, (1875) L. R. 10 Ch. 618, followed - 254
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—— *Wharton* v. *Masterman*, [1895] A. C. 186, distinguished - - - 541
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—— *Winkle, In re*, [1894] 2 Ch. 519, explained and distinguished - - - 462
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COMPANY—*Capital—Reduction—Available Assets—Goodwill—Reserve—Unappropriated Profits—Preference Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26).

The Court will not confirm a reduction of capital unless satisfied that it will not work unjustly or inequitably.

Share capital comprised ordinary shares and shares carrying a fixed cumulative preference dividend, with no preference as to capital and no voting power. The Court refused to confirm a reduction on the ground (inter alia) that the reduction would benefit the ordinary shareholders at the expense of the preference shareholders.

In ascertaining the available assets of a company for the purpose of a reduction of capital, the amounts of reserve and unappropriated profit and the value of goodwill are to be taken into account.

On an opposed petition to confirm a reduction of capital the Court will not act on the balance of speculative expert evidence as to the value of mining property. *In re* BARROW HÆMATITE STEEL COMPANY - - **Cozens-Hardy J. 846**

2. —— *Debentures—Floating Charge—Sale of Business—Injunction.*

The objects of a company comprised the carrying on three distinct businesses, supplemental to one another. The Court refused, at the instance of debenture-holders having a floating charge on the whole undertaking, to restrain the sale of one business. *In re* H. H. VIVIAN & CO. METROPOLITAN BANK OF ENGLAND AND WALES, LIMITED *v.* H. H. VIVIAN & CO. - **Cozens-Hardy J. 654**

3. —— *Debentures—Winding-up—Debenture-holder's Action—Judgment—Transfer—Cross-claim by Company against Transferor—Right to Registration.*

After resolutions for the voluntary winding-up of a company had been passed and a liquidator appointed, and judgment had been given in a debenture-holder's action against the company, R. became transferee, by way of security for a loan, of certain debentures from C., who had been a director of the company. The conditions of

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the debentures provided that transfers must be delivered at the registered office of the company with a fee, and such evidence of identity or title as the company might reasonably require, and thereupon the transfers would be registered; and that the principal and interest secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder. After R. had taken his transfer it was discovered that C. had been guilty of misfeasance, and he was ordered to pay a sum of money to the liquidator in respect thereof. R., who had had no notice of any cross-claim by the company, duly sent his transfer to the liquidator, who was also receiver in the action, for registration, but the liquidator declined to register it, and claimed to deduct C.'s debt to the company from the amount due on his debentures:—

Held, that the right to transfer and to have the transfer registered was not affected either by the winding-up or by the judgment in the action, and that consequently R. was entitled to receive without deduction any dividend payable in respect of C.'s debentures. *In re* GOY & CO. FARMER *v.* GOY & CO. - - - **Stirling J. 149**

4. —— *Director—Managing Director—"Clerk or Servant"—Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-s.* 1 (*b*)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *s.* 3.

A managing director of a company is not a "clerk or servant" within the meaning of the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1 (*b*). *In re* NEWSPAPER PROPRIETARY SYNDICATE, LIMITED. HOPKINSON *v.* NEWSPAPER PROPRIETARY SYNDICATE, LIMITED **Cozens-Hardy J. 349**

5. —— *Director — Misfeasance — Improper Allotment of Shares to Director at Undervalue—Measure of Damage—Practice—Appeal—Stay of Inquiries.*

It being held that directors of a company had improperly allotted a large number of shares to themselves at an undervalue:—

Held, that the directors must account to the company for the profits which they had derived from the sale of such of the shares thus allotted as they had disposed of, and that as to the shares which they retained the proper measure of the damages was, under the circumstances, not the highest price at which any shares of the company had been sold during the period for which the directors had held their shares, but the market value of the shares at the dates at which they were respectively allotted to the directors, and that the directors must pay to the company the excess (if any) of that market value above the sums which they had paid to the company for the shares respectively.

Decision of North J. affirmed with a slight variation.

A stay of inquiries directed by a judgment pending an appeal will be granted only under very special circumstances. SHAW *v.* HOLLAND **C. A. 305**

6. —— *Directors—Quorum—Articles of Association.*

The articles of association of a company provided (38) that the number of members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three, (42) that the continuing council might act notwithstanding any vacancy, and (53) that the council might determine the quorum necessary for the transaction of business.

The number of members of the council became reduced to two. It was alleged that the council had passed a resolution fixing the quorum at three:—

Held, that, even if the resolution had been passed, a security given by the two members of the council in favour of persons who had no knowledge or notice of the irregularity was valid.

Kirk v. *Bell*, (1851) 16 Q. B. 290, distinguished. *In re* BANK OF SYRIA. OWEN AND ASHWORTH'S CLAIM. WHITWORTH'S CLAIM **Wright J. 272**

7. —— *Meeting — Resolution — Evidence — Declaration of Chairman—Shareholders' Meeting —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

Apart from fraud, the declaration of the chairman of a meeting that a special resolution has been passed is conclusive.

At a meeting of a company duly convened to pass an extraordinary resolution to wind up voluntarily, the chairman declared the resolution carried on a show of hands; a poll was not demanded by five members. On a petition by a holder of paid-up shares to wind the company up compulsorily, the Court refused to entertain the question whether the resolution was carried by the requisite majority.

Young v. *South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268, not followed. *In re* HADLEIGH CASTLE GOLD MINES, LIMITED - - **Cozens-Hardy J. 419**

8. —— *Reconstruction—Winding-up—Contributory — Application for Shares — Withdrawal before Allotment.*

By a reconstruction or amalgamation agreement the C. Company and its liquidators agreed to transfer its goodwill and assets to the M. Company, part of the consideration for the transfer being that every member of the C. Company should, in respect of each share therein held by him, "be entitled as of right to claim an allotment" of either a debenture bond, or two ordinary shares of 5*l.* each in the M. Company credited with 1*l.* per share paid up, and the agreement provided that the M. Company should, within a month from the date of the agreement, allot and issue the bonds and shares claimed, subject to this, that it should not be bound to allot shares to any one to whom under its articles it could have objected as a transferee of shares. The agreement further provided that a claim must be made within twenty-one days from the date thereof by sending in to the M. Company or to the liquidators of the C. Company a signed claim in writing, and that the liquidators should within seven days from that date give notice in writing to each member of the C. Company stating the number of bonds or shares which he was entitled to claim as of right, with proper forms of claim. The liquidators duly gave notice to W., a share-

COMPANY—*continued.*

holder in the C. Company, who within the twenty-one days signed a document, addressed to the directors of the M. Company, claiming an allotment of ten ordinary shares with 1*l.* per share paid up, and agreeing to accept the same and to pay the further moneys payable thereon when called upon. Before any acceptance of the offer or the allotment of the shares subsequently made, W. wrote to the M. Company withdrawing his application. In the subsequent winding-up of the M. Company the liquidator of that company sought to have W. retained on the list of contributories in respect of the ten shares:—

Held, that the document sent by W. was an application which could be withdrawn by him before acceptance, and not an acceptance of a prior offer by the M. Company, and that he was not liable as a contributory. *In re* METROPOLITAN FIRE INSURANCE COMPANY. WALLACE'S CASE Cozens-Hardy J. 671

9. —— *Shareholder—Subscriber of Memorandum of Association—Liability to Pay for Shares—Issue of Shares on Different Terms—Directors—Breach of Duty—Power to make Calls—Duty to make Calls on their own Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 11, 14, 15, 22, 23, 31, 38.

A subscriber of the memorandum of association of a company limited by shares is (in the absence of any provision in the articles of association, or of an express agreement between him and the company to the contrary) not liable to make any payment in respect of the shares for which he subscribes, except as and when calls are made upon him in accordance with the provisions of the articles.

If directors issue other shares besides those which are taken by the subscribers of the memorandum, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient.

But if directors require other applicants for shares to make payments on application and allotment, and issue their own shares for which they have subscribed the memorandum without requiring any such payments to be made, and without disclosing to the other shareholders this difference between their position and that of the directors, they commit a breach of duty, even though in so doing they act without fraud, and in the belief that they are doing nothing wrong.

Directors who so use their powers as to obtain benefits for themselves at the expense of the other shareholders, without informing them of the facts, cannot be allowed to retain those benefits, but must account for them to the company, so that all the shareholders may participate in them.

Decision of Cozens-Hardy J., [1899] 2 Ch. 302, reversed. ALEXANDER *v.* AUTOMATIC TELEPHONE COMPANY - - - - C. A. 56

10. —— *Winding-up—Affidavit in Support of Petition — Defect or Irregularity — Companies Winding-up Rules*, 1890, *rr.* 36, 177 (1).

Where a petition for winding-up is presented by an individual and not by a company, the affidavit in support, referred to in rule 36 of the Companies Winding-up Rules, 1890, cannot be

COMPANY—*continued.*

made by the petitioner's manager; and non-compliance with the rule by filing only an affidavit by a person not by the rule authorized to make the affidavit cannot be waived by the Court as a "formal defect" or an "irregularity" within the meaning of rule 177 (1). *In re* CHARTERLAND STORES AND TRADING COMPANY Wright J. 870

11. —— *Winding-up—Distress—Landlord—Bill of Exchange for Rent—Debentures—Receiver—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 138, 163.

H. granted a lease to X. which was purchased by a company, but no assignment of it was taken. The company, however, entered into occupation of the demised premises, and gave H. bills of exchange for rent overdue, which bills were dishonoured. After the dishonour the company passed an extraordinary resolution for voluntary winding-up, and then the landlord distrained for the rent on the company's chattels. These, however, were subject to a floating security contained in debentures covering all the company's assets, which were insufficient in value to satisfy the debenture debt. No receiver had been appointed. The liquidators having moved to restrain the landlord from proceeding with the distress:—

Held, (1) that, but for the existence of the debentures, and notwithstanding *Ex parte Clemence*, (1883) 23 Ch. D. 154 (which the Court declined to follow), the landlord would have been restrained, as he had a right to prove in the winding-up; but (2) that, as the assets were covered by the debentures and were insufficient to satisfy the debenture debt, the liquidator had no right to intervene, following on this point *Ex parte Purssell*, (1887) 34 Ch. D. 646, and that the non-appointment of a receiver made no difference. *In re* HARPUR'S CYCLE FITTINGS COMPANY - - - - Wright J. 731

12. —— *Winding-up — Liquidator — Court's Power to Appoint Additional Liquidator in Voluntary Winding-up — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 141.

Sects. 138 and 141 of the Companies Act, 1862, enable the Court having jurisdiction to wind up companies to appoint a liquidator in a voluntary winding-up, not only where there is no liquidator acting or in the place of a liquidator who is by the Court removed from his office, but also in any other case where due cause is shewn for appointing a liquidator—e.g., when an additional liquidator is required—and the appointment may be made on the application of the existing liquidator. *In re* SUNLIGHT INCANDESCENT GAS LAMP COMPANY - - - - Wright J. 728

13. —— *Winding-up — Shareholder — Fully paid Shares—Omission to File Contract—Liquidator—Costs—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

Where, after a winding-up has commenced, relief has been granted to a shareholder under the Companies Act, 1898, the terms, if any, imposed as a condition of obtaining the relief are in the discretion of the Court, to be exercised according to the circumstances of each case.

And where the payment of the liquidator's costs is made a condition of obtaining relief,

there is no general rule as to whether the costs ought to be as between solicitor and client or party and party; but in determining this question the Court will have regard to the assistance given to the liquidator by the applicant and the reasonableness of opposing the application. *In re* FARMER'S UNITED. STEPHENSON'S CASE
Wright J. 442

14. —— *Winding-up—Shareholder's Petition—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79 *sub-s.* 5, 129 *sub-s.* 3, 145—*Directors' Meeting—Notices—Essential Formality.*

An order to wind up a company compulsorily will be made on the petition of a holder of a paid-up share, notwithstanding that an extraordinary resolution has been passed, under s. 129, sub-s. 3, of the Companies Act, 1862, to wind up voluntarily.

Fraud is a ground, but not the only ground, on which this jurisdiction is exercisable.

After a committee of investigation had reported in favour of proceedings against the directors of a company to make them liable for misfeasance, an extraordinary resolution was passed to wind up the company, and steps were taken to dissolve the company and destroy the books. The company was ordered to be wound up on the petition of a holder of a paid-up share.

An extraordinary resolution under s. 129, sub-s. 3, of the Companies Act, 1862, to wind up a company voluntarily:—

Held, ineffectual because the notices summoning the meeting had been issued by the secretary without the authority of a resolution of the directors duly assembled at a board. *In re* HAYCRAFT GOLD REDUCTION AND MINING COMPANY - - - Cozens-Hardy J. 230

15. —— *Winding-up—Shareholder's Petition for Compulsory Order—Effect of Voluntary Winding-up.*

A petition for a compulsory winding-up order was presented by a fully paid shareholder who was supported by a considerable number of the other shareholders. Resolutions for voluntary winding-up had been passed with a view to a reconstruction, which had, however, proved abortive at the time of the hearing of the petition. There were also matters which appeared to require investigation:—

Held, that a compulsory winding-up order must be made, and that, in arriving at that conclusion, the fact that the voluntary winding-up was not an ordinary one, but was resolved upon with the view to a specific object which had failed, was a reason strongly influencing the Court. *In re* GUTTA PERCHA CORPORATION
Cozens-Hardy J. 665

16. —— *Winding-up—Surplus Assets—Distribution not according to Legal Rights—Implied Term in Resolution—Shareholders—Powers of Majority.*

The A. Company, with a capital of 550,000*l.* divided into shares of 10*l.* each, of which 35,000 were preference shares and 20,000 were ordinary shares, and with articles of association which were silent as to how the surplus assets were to be divided between the two classes of shareholders in the event of winding-up, entered into an

agreement, under a power in its memorandum of association, to sell its undertaking and assets to the C. Company.

Part of the consideration for the sale was a sum of 310,000*l.* stock of the C. Company, which was to be distributed among the holders of the preferred and deferred shares of the A. Company, and accepted by them in satisfaction of their interests in the property sold; and the agreement was expressed to be conditional on all necessary resolutions of the shareholders of the A. Company being passed.

The agreement was silent as to the proportions in which the stock was to be divided between the two classes of shareholders, and so was the notice convening a meeting of the shareholders to pass a resolution approving the agreement and authorizing the directors of the A. Company to carry the same into effect. A circular sent by the secretary of the A. Company with the notice stated that the purchase consideration to the shareholders of 310,000*l.* stock was to be distributed among them in the proportion of 210,000*l.* to the preferred shareholders, and 100,000*l.* to the deferred shareholders. This suggested mode of distribution was referred to at the meeting, where it was also pointed out that the suggested mode was not in accordance with the legal rights of the two classes of shareholders in a winding-up. There were absentees from the meeting, and only a majority of the shareholders present voted for the resolution:—

Held, that the Court could not (as it had done in *Somes* v. *Currie*, (1855) 1 K. & J. 605, and *In re Beeston Pneumatic Tyre Co.*, W. N. (1898) 34; 14 Times L. R. 338) draw an inference from the facts that all the parties concerned had agreed upon a mode of distribution not in accordance with the legal rights of the two classes of shareholders, and that, unless successful proceedings could be taken against the A. Company or its directors, or to set aside the resolution, or all individual consents of shareholders could be obtained, the liquidators must distribute the 310,000*l.* stock in accordance with the legal rights of the shareholders. *In re* NORTH WEST ARGENTINE RAILWAY COMPANY Wright J. 882

17. —— *Winding-up—Voluntary Winding-up—Prejudice to Creditors—Wishes of Creditors—Compulsory Order—Discretion of Court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 91, 145, 149.

The voluntary winding-up of a company is no bar to a compulsory order if the general body of the creditors desire it, although no individual creditor proves in accordance with s. 145 of the Companies Act, 1862, that his rights will be prejudiced by a voluntary winding-up.

In such a case the right of the general body of the creditors to have effect given to their wishes under ss. 91 and 149 is untouched by s. 145, although the primâ facie right of an individual creditor to a compulsory order, ex debito justitiæ, is restricted by that section.

In re West Hartlepool Ironworks Co., (1875) L. R. 10 Ch. 618, *In re Gold Co.*, (1879) 11 Ch. D. 701, and *In re The Varieties, Limited*, [1893] 2 Ch. 235, followed.

COMPANY—*continued.*

In re New York Exchange, Limited, (1888) 39 Ch. D. 415, and *In re Russell, Cordner & Co.*, [1891] 3 Ch. 171, distinguished. *In re* E. BISHOP & SONS, LIMITED - - - Farwell J. 254

18. —— *Winding-up—Voluntary Winding-up—Supervision Order—Liquidator—Remuneration—Liquidator's Solicitor—Costs—Petitioning Creditor—Priorities—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 144, 151—*Companies Winding-up Rules*, 1890, *r.* 31.

Where a company has gone into voluntary liquidation and appointed a liquidator, and afterwards, on a creditor's petition for a compulsory order, a supervision order is made directing the petitioner's and liquidator's costs to be taxed and paid out of the assets, the liquidator's remuneration for the period from the commencement of the winding-up to the supervision order must be postponed to the taxed costs of the petitioner and of the liquidator's solicitor, and also to any further costs for work properly done by the solicitor by the authority of the liquidator subsequently to the order.

In re New York Exchange Co., [1893] 1 Ch. 371, considered. *In re* SANITARY BURIAL ASSOCIATION - - - - C. A. 289

—— Costs—Solicitors' lien—Charging order—Property recovered for company—Application after winding-up—Delay - 433
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—— Interrogatories—Answer by officer of company - - - - - 1
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—— Shares—Charging order—Judgment debt—Maintenance of lunatic—Scheme 54, n.
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COMPENSATION—Conditions of sale—Misdescription—Clause excluding compensation—Specific performance—Possessory title - - - - - 858
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CONDITIONS OF SALE—Misdescription—Clause excluding compensation—Specific performance—Possessory title - 858
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—— "Omission in particulars"—Compensation—Misleading condition—Caveat emptor
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CONFLICT OF LAWS—*Lunacy—Private International Law—Foreign Lunatic—English Property—Movables—Personal Estate—Curator—Administrateur Provisoire—Right to Sue in England—Order of Foreign Court—Jurisdiction—Detinue—Trover—Practice—Lunatic not so found, Action by—Next Friend—Maintenance—Scheme—Creditors—Priority—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 134—*Form of Judgment—Stock—Vesting Order.*

An action brought in a proper case in the name of a lunatic not so found by his next friend, for the recovery of his property may, in the absence of any lunacy proceedings, be maintained without the sanction of the Court in Lunacy.

The Court in Lunacy, having property of a lunatic under its control, will, as between the lunatic and his creditors, see that proper provision

CONFLICT OF LAWS—*continued.*

is made out of the property for his maintenance, as the first and paramount consideration; but, subject to that, the Court will not withhold a creditor from exercising his legal rights (see note, [1900] 2 Ch. 54).

A foreign curator or administrateur provisoire of a lunatic, not so found judicially, domiciled and resident abroad, is not necessarily an improper person to sue in this country as next friend for the recovery of the lunatic's personal property here, though, if such next friend is resident abroad, he may be required to give security for costs.

The Court in Lunacy has no jurisdiction under s. 134 of the Lunacy Act, 1890, to order the transfer of securities in this country standing in the name of or vested in a person of unsound mind, not so found, residing out of the jurisdiction of the High Court, unless his status has been altered by his being judicially declared lunatic according to the law of the place where he is residing.

G., domiciled and resident in Belgium, deposited with an English bank for safe custody, in his name, certificates and scrip for securities of great value. On his death in 1892 his widow, then also domiciled and resident in Belgium, took out administration in England to his estate, and had the securities then standing to his account, and also a sum of cash representing dividends thereon collected by the bank on his account, transferred to a new account opened by her at the bank in her own name.

In 1897 she became lunatic, though she was not so declared judicially, and was placed in a foreign lunatic asylum. D., a Belgian, was appointed by the Belgian Court her "administrateur provisoire," with power to collect and get in her personal estate, and subsequently D. obtained in England letters of administration de bonis non to G.'s estate, whereupon he brought an action in England against the bank in the names of himself and of Madame G. (the writ not stating that she was of unsound mind or that he was suing as her next friend) claiming, in his double capacity of legal personal representative of G. and of administrateur provisoire of Madame G., to have the certificates, scrip and cash standing in her name delivered up to him. North J., upon the action coming on before him for trial, took the preliminary objection that it was improperly constituted in that Madame G., being of unsound mind, could not sue without a next friend, whereupon D. was appointed next friend, and the title of the action was amended accordingly. The trial having then proceeded on that footing, North J. held that the defendants, the bank, could not safely deliver the property to the plaintiff D. without the authority of an order of the Court in Lunacy; and also that as the action was not one for the protection of the lunatic's person or property, but in the nature of detinue, it was not a form of action in which the lunatic could sue by her next friend. The plaintiff D. appealed, having first obtained from the Belgian Court an order giving him leave to appeal with a view to recovering the property:—

Held, by the Court of Appeal (Lindley M.R., and Rigby and Vaughan Williams, L.JJ.),

CONFLICT OF LAWS—*continued.*

(1.) that as D. and Madame G. had together a clear legal title to the property sought to be recovered, D. was entitled, suing in his own name and as next friend of Madame G., to demand the delivery of her property to him and could give the bank a good discharge: and (2.) that, in the absence of lunacy proceedings in this country, the Court was bound, on general principles of private international law, to recognise the order of the Belgian Court giving D. leave to prosecute the appeal and to obtain and give a good discharge for the property.

Scott v. *Bentley*, (1855) 1 K. & J. 281, considered and approved.

In re Barlow's Will, (1887) 36 Ch. D. 287, discussed.

Form of judgment, including vesting order as to stock in Madame G.'s name. DIDISHEIM *v.* LONDON AND WESTMINSTER BANK - C. A. 15

2. —— *Marriage—Domicil—Change of Domicil—Immovable Goods—French Law—Lex rei sitæ—Community of Goods—Statute of Frauds*, 1676 (29 *Car.* 2, *c.* 3), *ss.* 4, 7.

A Frenchman and Frenchwoman married in France without any express marriage contract, so that according to the French law their rights as to property were subject to the law of community of goods. Subsequently they came to England and acquired an English domicil, and the husband amassed a large fortune, part of which he invested in real and leasehold property here. He died in the lifetime of the wife, having purported to dispose of all his property by an English will. It having been held that as to movables the wife was entitled notwithstanding the change of domicil to a one-half share under the law of community of goods, the question arose whether she was entitled on the same footing to a share of the real and leasehold property:—

Held, (1) that there being here a special marriage contract defined by reference to the French Code, it had the same binding effect as an express contract, and was enforceable against the real and leasehold property in this country, subject to the question whether the Statute of Frauds required the contract to be in writing, as creating an interest in land: (2) on the authority of *Forster* v. *Hale*, (1800) 5 Ves. 308; 4 R. R. 128, and *Dale* v. *Hamilton*, (1846) 5 Hare, 369, that the Statute of Frauds did not apply, inasmuch as this was in substance a contract for a partnership, and the property required for the purposes of the partnership was by operation of law held for those purposes:

Held, therefore, that the real and leasehold property was subject to the community of goods. *In re* DE NICOLS. DE NICOLS *v.* CURLIER Kekewich J. 410

3. —— *Nullity of Marriage—Consular Marriage in France—Frenchman and Englishwoman—Validity of Ceremony—Consular Marriage Act*, 1849 (12 *&* 13 *Vict. c.* 68)—*Foreign Marriage Act*, 1892 (55 *&* 56 *Vict. c.* 23).

A marriage between a Frenchman and an Englishwoman duly solemnized in France under the Consular Marriage Act, 1849 (repealed and virtually re-enacted by the Foreign Marriage Act, 1892), is valid as regards form in England, though declared invalid as regards form by a French Court.

Simonin v. *Mallac*, (1860) 2 Sw. & Tr. 67, followed. HAY *v.* NORTHCOTE Farwell J. 262

—— Power of appointment - - - 339
See POWER. 1.

4. —— *Settlement — Infant — Female Infant — Ratification — Repudiation — Marriage with Foreigner—Change of Domicil by Marriage—Operation of English Law—Marriage Settlement.*

Prior to the marriage in 1864 of an Irish lady under twenty-one with an Austrian, marriage articles in English form were executed by her and her intended husband, by which it was declared and agreed by and between the parties thereto that, in case the marriage should take place, the then personal property and certain after-acquired personal property of the lady should be vested in trustees upon the usual trusts of an English marriage settlement. After the marriage the husband retained his Austrian domicil. In 1880 a settlement in English form, which purported to be made in pursuance of the articles, was executed by the husband and wife in Paris. The wife afterwards executed appointments of new trustees of the settlement, and in 1889 she exercised in favour of one of her daughters a power of appointment reserved to her by the settlement. In 1893 the husband and wife executed in Austria, in accordance with Austrian law, a notarial act, by which they purported to revoke and annul the marriage articles and the settlement of 1880, and to vest in the wife the unrestricted administration of all her property. In 1896 the husband and wife and their four children (all of whom had attained twenty-one) brought an action against the trustees in the Chancery Division, claiming a declaration that, by virtue of the notarial act of 1893, the marriage articles and the settlement were wholly cancelled and annulled and were void by Austrian law.

By Austrian law a husband and wife have a right to revoke their marriage contract, notwithstanding the birth of issue and acts of ratification, and this right of revocation cannot be waived, and is not lost by lapse of time:—

Held, that inasmuch as upon her marriage the wife acquired the Austrian domicil of her husband and became subject to Austrian law, she never could ratify the settlement or deprive herself of the right to repudiate it, the result being that she never had the power, either before or after her marriage, of making an irrevocable contract.

Consequently the English doctrine, that the voidable contract of an infant will bind him if he does not repudiate it within a reasonable time after he attains twenty-one, had no application:—

Held, therefore, that the wife was not bound by the marriage articles or by the settlement, and that the revocation by the notarial act of 1893 was effectual.

Decision of Cozens-Hardy J., [1899] 2 Ch. 569, reversed. VIDITZ *v.* O'HAGAN - C. A. 87

5. ——*Will—Domiciled Foreigner—Unattested Will—Immovables — Leaseholds — Administration*

CONFLICT OF LAWS—*continued.*
with Will annexed—Lex rei sitæ—Lex Domicilii —Wills Act, 1837 (1 *Vict. c.* 26), *s.* 9.
The beneficial interest in leasehold property in England will not pass under the will of a domiciled foreigner executed according to the law of his domicil, but not attested as required by the Wills Act, notwithstanding that letters of administration with the will annexed have been granted by the Probate Division. PEPIN *v.* BRUYÈRE - - - **Kekewich J. 504**

CONSENT — Lessor's — Unreasonable refusal — Unwilling purchaser—Covenant against assignment - - - - 202
See VENDOR AND PURCHASER. 8.

CONSULAR MARRIAGE—In France—Frenchman and Englishwoman — Validity of ceremony - - - - 262
See CONFLICT OF LAWS. 3.

CONTINGENT ANNUITY — Settlement estate duty—Incidence - - - 873
See REVENUE. 1.

CONTINGENT INTERESTS — Infants — Maintenance—Term for raising portions 683
See INFANT.

CONTINGENT LEGACY—Settlement estate duty —Incidence - - - 873
See REVENUE. 1.

CONTRACT — *Illegality — Remoteness — Uncertainty—Statutory Confirmation—Contract to give "First Refusal" of Land—Interest in Land—Purchaser with Notice—Injunction.*
An agreement scheduled to an Act of Parliament was thereby "confirmed and declared to be valid and binding upon the parties thereto."
Held, that every clause of the agreement had statutory validity, so that no objection on the ground of remoteness or uncertainty could be taken.
Sevenoaks, Maidstone and Tunbridge Ry. Co. v. *London, Chatham and Dover Ry. Co.*, (1879) 11 Ch. D. 625, and *Kent Coast Ry. Co.* v. *London, Chatham and Dover Ry. Co.*, (1868) L. R. 3 Ch. 656, followed.
Caledonian Ry. Co. v. *Greenock and Wemyss Bay Ry. Co.*, (1874) L. R. 2 H. L., Sc. 347, *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1888) 40 Ch. D. 100, and *Reg.* v. *Midland Ry. Co.*, (1887) 19 Q. B. D. 540, distinguished.
A racecourse company agreed with a canal company that if it should be at any time proposed to use their racecourse for dock purposes the racecourse company should give the canal company the first refusal thereof:—
Held, (1.) A proposed user by any intending purchaser (including the canal company) entitled the canal company to a first refusal.
(2.) The racecourse company could not sell the racecourse without informing the canal company of the actual cash price the intending purchaser was offering, and offering it to them at that price.
(3.) The right of first refusal could be enforced against an intending purchaser with notice thereof on two grounds—namely:
(*a*) It was an interest in the land: *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562.
(*b*) While the matter rested in fieri, the Court, by an inverse application of the principle of *Willmott* v. *Barber*, (1880) 15 Ch. D. 96, could restrain the intending purchaser from accepting a conveyance of the legal estate in breach of his vendor's prior contract.
MANCHESTER SHIP CANAL COMPANY *v.* MANCHESTER RACECOURSE COMPANY **Farwell J. 352**

CONTRACT—*continued.*
—— Authority to sign—Principal and agent—Instructions to sell—Real estate 267
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—— Married woman—Action against—Joinder of husband—Tort—Liability of husband
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—— Omission to file—Winding-up of company — Shareholder — Fully-paid shares — Liquidator's costs - - - 442
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—— Repudiation—Purchase-money payable by instalments — Omission to pay last instalment — Specific performance — Damages - - - - 298
See VENDOR AND PURCHASER. 1.

—— Vendor and purchaser.
See Cases under VENDOR AND PURCHASER.

CONTRIBUTORY—Reconstruction of company—Application for shares — Withdrawal before allotment - - - 671
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CONVERSION—Discretionary power of postponement—Tenant for life and remainderman —Rate of interest - - - 107
See TENANT FOR LIFE.

—— Real estate—postponement of sale—Interim rents—Enjoyment in specie - 829
See SETTLED LAND. 7.

—— Real estate—Sale—Distribution—Payment to trustees having power of sale — "Persons absolutely entitled" - 474
See PARTITION.

CONVEYANCE — Form of — General words—Parcels—Summons—Practice - 595
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CONVEYANCING AND LAW OF PROPERTY—Conveyancing, Form of—General words —Parcels—Summons—Practice - 595
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—— Forfeiture—Covenant to build—Notice of breach—Sufficiency - - 156
See LANDLORD AND TENANT.

—— Light — Implied easement — Mortgagee — Power of sale - - - 211
See LIGHT 1.

—— Merger—Expressed grant of fee—Leasehold title in equity - - - 635
See MERGER. 2.

—— Receipt—Mortgagor's signature induced by fraud of his solicitor—"Non est factum" —Estoppel—Title of mortgagee - 425
See MORTGAGE. 3.

CORRESPONDENCE — Between solicitor and client relating to litigation—Discovery —Privilege - - - - 315
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COSTS—Affidavit—"Information and belief"—Irregularity — Evidence — Inadmissibility - - - - - 753
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—— Higher scale—Allegations of fraud - 717
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—— Liquidator — Remuneration — Liquidator's solicitor—Petitioning creditor — Priorities - - - - - 289
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—— Liquidator — Winding-up of company — Shareholder — Fully paid shares — Omission to file contract - - 442
See COMPANY. 13.

—— Profit costs — Solicitor mortgagee — Mortgagees Legal Costs Act—Retrospective effect - - - - - 745
See MORTGAGE. 2.

—— Severance of defence—Builder—Indemnity —Third party procedure - - 211
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—— "Testamentary expenses"—Administration on intestacy—Estate duty - 182
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—— Translations—Foreign documents—Solicitor —Administration - - - 251
See SOLICITOR. 3.

COVENANT — *Restrictive Covenant — Benefit — Covenant running with the Land — Covenant enforceable in Equity — "One Messuage" — "House" "Private Residence" — "Residential Flats."*

When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by proof of facts inconsistent with it.

The owners of building land and their mortgagees conveyed a plot of the land in fee to a purchaser, who entered into a covenant with the mortgagors (but not with the mortgagees) that no more than one messuage or dwelling-house should at any one time be erected or be standing on the plot, and that such messuage should be adapted for and used as and for a private residence only. The conveyance stated that the covenant was entered into with intent that it might so far as possible bind the premises thereby conveyed and every part thereof, into whosesoever hands the same might come, and might enure to the benefit of the mortgagees, their heirs and assigns, and others claiming under them to all or any of their lands adjoining or near to the premises.

The mortgagors afterwards conveyed another plot of land near to the first in fee to a purchaser

COVENANT—*continued.*

who had no knowledge of the covenant entered into by the purchaser of the first plot:—

Held, that assigns of the second plot could enforce the restrictive covenant against an assign of the first plot.

Decision of Farwell J. affirmed.

Held also, that the erection on the first plot of a large block of buildings, which were to be occupied as residential flats, would be a breach of the covenant.

The covenant having been released by the mortgagors (so far as they lawfully could) as regarded the number of houses to be erected, the purchaser's devisee covenanted with the mortgagors that every messuage to be erected on the land should be adapted for and used as and for a private residence only:—

Held, that the erection of the proposed building would be a breach of the covenant also.

An injunction was accordingly granted to restrain the assign of the first plot from erecting such a block of buildings upon it. ROGERS *v.* HOSEGOOD - - - - C. A. 388

—— Assignment, Qualified covenant against—Unwilling purchaser—Lessor's consent —Unreasonable refusal - - 202
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—— For title—Patent—Joint grant—Survivorship — Concurrence of legal personal representative in assignment - 280
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—— Implied—Recital of agreement - 534
See HUSBAND AND WIFE. 2.

—— "Tied public-house"—"Clog" on redemption — Covenant by mortgagor to take beer from mortgagee only - - 445
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—— To repair — Continuing breach—Waiver—Notice of breach — Sufficiency — Relief against forfeiture - - - 156
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CREDITOR—Lunatic—Maintenance — Scheme—Priority - - - - 15
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—— Priorities — Liquidator — Remuneration — Liquidator's solicitor—Costs—Petitioning creditor - - - - 289
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—— Voluntary—Insolvent estate - - 676
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CUSTODY—Title-deeds—Person having powers of tenant for life—Possession - 778
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—— Trustees—Investment—Convertible securities—Bearer bonds—Bankers - 529
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CUSTOMERS—Disclosure of names of—Discovery —Patent action—Account of profits 556
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DAMAGES—Measure of—Directors—Misfeasance — Improper allotment of shares to director at undervalue - - 305
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—— Patent action—Infringement - - 246
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—— Purchase-money payable by instalments—Omission to pay last instalment—Repudiation of contract—Specific performance - - - - 298
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DEEDS—Title-deeds—Custody—Person having powers of tenant for life—Possession
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—— Donee of power a domiciled Frenchwoman—Holograph will of donee in French language unattested - - 339
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—— Marriage—Validity—Prohibited degrees of consanguinity—Solemnization according to Jewish rights—Lex domicilii - 481
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—— Will — Unattested will — Leaseholds—Administration with will annexed—Lex rei sitæ—Lex domicilii - - 504
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DONATIO MORTIS CAUSÂ — *Validity* — *Nuncupative Will.*

An old lady, shortly before her death and in anticipation thereof, expressed a desire to give all her property to the defendant upon certain conditions, and directed him to record her wishes in writing, which he did. The document purported to give to the defendant all the property she might have at her death, subject to his settling up her affairs, seeing to her burial, and making certain specified payments to named charities. She then delivered to the defendant a deposit note and share certificate, saying, "Take charge of them. If I get better you will bring them back; if not, you will know what to do with them." She subsequently told him where to find some gold and notes, but gave him no further directions as to them:—

Held, that, looking at the transaction as a whole, the intention of the deceased was that the specific articles should be dealt with simply as part of the property which she meant to dispose of as from her death, and over which she meant to reserve dominion during her life; that consequently there was no valid donatio mortis causâ.

SOLICITOR TO THE TREASURY *v.* LEWIS
Stirling J. 812

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FLATS — Restrictive covenant — Benefit — Covenant running with the land — "Private residence" — Residential flats" - - - - 388
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FORECLOSURE—Redemption — Solicitor mortgagee—Profit costs—Mortgagees Legal Costs Act—Retrospective effect - 745
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FOREIGN DOCUMENTS—Translations—Solicitor—Costs—Administration - - 251
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FOREIGN LUNATIC—Curator—Right to sue in England—Order of foreign Court—Jurisdiction - - - 15
See CONFLICT OF LAWS. 1.

FOREIGN MARRIAGE — Consular marriage in France—Frenchman and Englishwoman—Validity of ceremony - - 262
See CONFLICT OF LAWS. 3.

—— Marriage with foreigner—Infant—Settlement — Ratification — Repudiation — Change of domicil by marriage - 87
See CONFLICT OF LAWS. 4.

FOREIGNER—Leaseholds—Domiciled foreigner—Unattested will—Administration with will annexed - - - 504
See CONFLICT OF LAWS. 4.

FORFEITURE — Relief against — Covenant to build — Repairs — Notice of breach—Sufficiency - - - - 156
See LANDLORD AND TENANT.

FRANCE—Consular marriage in — Frenchman and Englishwoman—Validity of ceremony - - - - - 262
See CONFLICT OF LAWS. 3.

FRAUD — Costs — Higher scale — Allegations of Fraud - - - - 717
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—— Receipt—Mortgagor's signature induced by fraud of his solicitor—"Non est factum"—Estoppel—Title of mortgagee - 425
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FRAUDS, STATUTE OF — Marriage—Domicil, Change of—Immovable goods—French law — Lex rei sitæ — Community of goods - - - - 410
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FRENCH LAW—Marriage—Domicil, Change of—Immovable goods—Lex rei sitæ—Community of goods—Statute of Frauds
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HOTCHPOT—Rent, Non-payment of — Absolute title of tenant—Real property limitation - - - - - 616
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HUSBAND AND WIFE—*Bond by Husband—Marriage Settlement — Wife's Property — Life Interest—Separate Use—Restraint on Anticipation — Trust Fund — Loan to Husband — Bond by Husband to Trustees — Interest-bearing Security—Interest on Bond—Penalty—Damages—Express Trust—Bond in Husband's Possession—Presump-*

HUSBAND AND WIFE—*continued.*

tion of Payment—Statute-barred Debt—4 *&* 5 *Anne, c.* 16, *ss.* 12, 13 (*c.* 3 *in* 1 *Rev. Stat. p.* 784) *—Statute of Limitations—Civil Procedure Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 5.

By a marriage settlement, dated in 1847, a fund belonging to the wife was vested in trustees in trust for investment "on real or personal securities bearing interest," with power of varying investments with the written consent of the husband and wife or the survivor, and to pay the income to the wife for her separate use without power of anticipation, then to the husband for life, and after the death of the survivor, as to the capital, upon the trusts therein mentioned.

In 1852 the trustees, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. per annum six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months.

The husband and wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 and the husband in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—

Held, affirming Byrne J., [1899] 2 Ch. 561, that the bond debt was not barred by the Statute of Limitations (3 & 4 Will. 4, c. 42), s. 5, on the grounds (1.) that the bond, being a penalty bond, was an interest-bearing security carrying interest (though not mentioned) beyond the date fixed for payment of the debt; (2.) that as the husband and wife had lived together in amity it was unnecessary, in order to prevent the statute from running, to go through the formality of the husband paying the interest to the trustees, the trustees paying it to the wife, and the wife paying it to the husband; and (3.) that, as the husband took with full notice that the money lent was trust money and liable to investment on interest-bearing security, he was in the position of an express trustee: *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, 396:

Held, also, that no presumption of discharge of the bond arose from the mere fact of its being in the obligor's possession at his death.

Sects. 12 and 13 of the statute 4 & 5 Anne, c. 16, merely recognised and confirmed the doctrine, previously established by the Court of Equity, that, in the case of a bond with a penalty, the true intent of the penalty was to secure payment, not only of the stated principal money and interest on the day fixed, but also of subsequent interest down to the actual payment of the principal, although the bond contained no stipulation for interest beyond the day fixed. Under that statute the interest is payable as interest, and not as damages for non-payment on the day fixed.

The nature of single and penalty bonds, and the liability to interest on them respectively, discussed.

Bonafous v. *Rybot*, (1763) 3 Burr. 1370, *Spickernell* v. *Hotham*, (1854) Kay, 669, *Amos* v. *Smith*, (1862) 1 H. & C. 238, *Cook* v. *Fowler*, (1874) L. R. 7 H. L. 27, and *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, discussed. *In re* DIXON. HEYNES *v.* DIXON - - - **C. A. 561**

HUSBAND AND WIFE—*continued.*

2. —— *Separate Estate—Settlement by Infant —Married Woman—Subsequent Repudiation—Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 2, 19—*Construction—Recital of Agreement—Implied Covenant.*

The principle stated in *Hancock* v. *Hancock*, (1888) 38 Ch. D. 78—namely, that s. 19 of the Married Women's Property Act, 1882, prevents s. 5 of that Act from interfering with any settlement which would have bound the property if the Act had not been passed—applies also to s. 2 and to settlements by which the wife is not bound.

Stevens v. *Trevor-Garrick*, [1893] 2 Ch. 307, followed.

An ante-nuptial settlement made between the intended husband, the intended wife (an infant), and trustees recited an agreement that property belonging to the wife and then in the hands of the trustees should be settled. By the testatum the wife, in pursuance of the agreement, declared that the trustees should hold the property on certain trusts. There was no declaration or covenant by the husband. On attaining twenty-one the wife repudiated the settlement:—

Held, that there was an agreement between the husband and the trustees, and that the recital of that agreement was operative as between the parties to it, although unaccompanied by any obligation binding on the infant wife. The husband's marital right was affected by the agreement; there was, therefore, a settlement which would have bound the property if the Married Women's Property Act, 1882, had not been passed, and the wife was not entitled to have the trust funds transferred to her as her separate estate. BUCKLAND *v.* BUCKLAND - - **Buckley J. 534**

3. —— *Unity of Person—Contract by Wife—Fraud by Wife—Tort—Liability of Husband—Practice—Action against Wife—Joinder of Husband — Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.

Although a husband is not liable on his wife's contract, he is liable for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract and is the means of effecting or inducing it and is part of the same transaction. That liability, which existed before the Married Women's Property Act, 1882, is not affected by the Act, nor is the remedy of the party injured limited by the Act to the wife's separate estate, if any.

Thus, where since the Act a contract had been entered into by K., a married woman, with E., under which E. was to pay K. a sum of money in a certain event, and subsequently K. induced E. to pay her the money by a false representation that the event had happened, it was *held* (1.) by Byrne J., [1900] 1 Ch. 203, and by the Court of Appeal, that as the contract had not been induced by the fraud and was altogether independent of it, K.'s husband was liable to E. in damages for his wife's fraud; and (2.)

Held, by the Court of Appeal, that the Married

HUSBAND AND WIFE—*continued.*
Women's Property Act, 1882, did not exempt the husband from his liability.
Liverpool Adelphi Loan Association v. *Fairhurst*, (1854) 9 Ex. 422, *Wright* v. *Leonard*, (1861) 11 C. B. (N.S.) 258, on the first point, and *Seroka* v. *Kattenburg*, (1886) 17 Q. B. D. 177, on the second, approved of.
The expression "need not be joined" in s. 1, sub-s. 2, of the Act does not mean that, whenever a plaintiff is suing a married woman in contract or in tort, he "shall not" join the husband with her, but only that the joinder, which was formerly necessary, is now unnecessary if the plaintiff is seeking to obtain satisfaction out of the wife's separate estate alone. EARLE *v.* KINGSCOTE C. A. 585

—— Separation deed—Retainer of trust—Property to satisfy annuity - - 164
See TRUSTEE. 5.

ILLEGALITY — Contract — Remoteness—Uncertainty—Statutory confirmation - 352
See CONTRACT.

INDEMNITY—Third party—Builder—Severance of defence—Costs - - - 211
See LIGHT. 1.

—— Trustee's right of — Purchase of land by trustee of settled estates — Entry by tenant for life — Non-payment of principal - - - - 736
See VENDOR AND PURCHASER. 7.

INFANT — *Maintenance—Contingent Interests—Settled Estates—Term for raising Portions.*
Where portions are given to younger children under a settlement made by a father, or other person standing in loco parentis, and the settlement contains no provision for the maintenance of the children, interest by way of maintenance for the children during minority will be allowed on their portions although their interests are contingent. *In re* GREAVES' SETTLED ESTATES. JONES *v.* GREAVES - - Farwell J. 683

—— Marriage settlement — Ratification — Repudiation — Marriage with foreigner — Change of domicil by marriage - 87
See CONFLICT OF LAWS. 4.

—— Settlement by—Subsequent repudiation—Married woman—Separate estate 534
See HUSBAND AND WIFE. 2.

INFRINGEMENT—Patent - - - 246
See PATENT. 1.

INJUNCTION—Ancient lights - 138, 211
See LIGHT. 1, 2.

—— Contract to give "first refusal" of land—Interest in land—Purchaser with notice
See CONTRACT. 352

—— Land acquired for specific purpose—Application of part not required to another permanent purpose—Local Goverment Board—Jurisdiction - - 377
See LOCAL GOVERNMENT.

—— Nuisance—Adjoining premises—Alteration—Reasonable use of a building - 373
See NUISANCE.

INJUNCTION—*continued.*
—— Patent action — Infringement — Foreign-made articles—Damages - - 246
See PATENT. 1.

—— Restraint of trade—Illegal objects—Expulsion of member—Jurisdiction of Court
See TRADE UNION. 605

—— Sale of business — Debentures — Floating charge - - - - 654
See COMPANY. 2.

INN—"Tied" public-house—"Clog" on redemption—Covenant by mortgagor to take beer from mortgagee only - 445
See MORTGAGE. 1.

INN OF CHANCERY — Clifford's Inn — Failure of objects—Charity - - 511
See VOLUNTARY ASSOCIATION.

INSOLVENT ESTATE—Voluntary creditor 676
See ADMINISTRATION. 1.

INSTALMENTS—Purchase-money payable by—Omission to pay last instalment—Repudiation of contract — Specific performance—Damages - - - 298
See VENDOR AND PURCHASER. 2.

INTEREST—Loan to husband—Bond by husband to trustees—Statute of Limitations 561
See HUSBAND AND WIFE. 1.

—— Rate of — Trust for conversion — Discretionary power of postponement—Tenant for life and remainderman - 107
See TENANT FOR LIFE.

INTERNATIONAL LAW.
See Cases under CONFLICT OF LAWS.

INTERROGATORIES — Company, Answer by officer of—Practice - - 1
See PRACTICE. 5.

INTESTACY — Accumulations — Trust to accumulate income beyond twenty-one years
See WILL. 1. 541

INVENTED WORD—Trade-mark - - 238
See TRADE-MARK. 2.

INVESTMENT—Administration action - 524
See ADMINISTRATION.

—— Trustees — Convertible securities — Bearer bonds—Custody—Bankers - 529
See TRUSTEE. 2.

JEW — Marriage—Validity — Domiciled British subjects—Prohibited degrees of consanguinity—Lex domicilii - - 481
See MARRIAGE.

JOINDER — Husband — Action against wife — Fraud by wife — Tort — Liability of husband - - - - 585
See HUSBAND AND WIFE. 3.

JOINT GRANT — Patent—Survivorship — Concurrence of legal personal representative in assignment—Practice - - 280
See PATENT. 2.

JUDGMENT DEBT—Charging order—Shares—Maintenance of lunatic—Scheme 54, n.
See LUNACY. 1.

JUDGMENT DEBT—*continued.*

—— Receiver and manager—Preferential payments — Proper outgoings — Compensation - - - - 436
See RAILWAY.

JUDICIAL TRUSTEE — Appointment — Jurisdiction of Court—Official trustee 749
See TRUSTEE. 3.

—— Breach of trust—Executor—Devastavit—Reliance on solicitor — Relief from liability - - - - 707
See TRUSTEE. 1.

JUDICIAL TRUSTEES RULES, 1897, r. 23 (1).
See TRUSTEE. 3. 749

JURISDICTION—Judicial trustee—Appointment—Jurisdiction of Court—Official trustee
See TRUSTEE. 3. 749

—— Local Government Board—Land acquired for specific purpose — Application of part not required to another permanent purpose - - - - 377
See LOCAL GOVERNMENT.

—— Lunacy — Vesting order — Appointment of person to exercise power of appointing new trustees - - - 551
See LUNACY. 2.

—— Lunacy—Vesting order — Stock — Form of judgment - - - - 15
See CONFLICT OF LAWS. 1.

LAND—Local Government Board—Jurisdiction—Land acquired for specific purpose—Application of part not required to another permanent purpose - 377
See LOCAL GOVERNMENT.

LANDLORD AND TENANT—*Lease—Covenant to Build—Covenant to Repair—Continuing Breach — Waiver — Recovery of Possession — Notice of Breach—Sufficiency—Relief against Forfeiture—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The plaintiffs demised to the defendants a piece of land, and the defendants covenanted within twelve months to erect certain buildings thereon, and also at all times during the term of the lease to keep the premises "so to be erected as aforesaid in good and substantial repair, and the same in good and substantial repair" to deliver up at the expiration of the term. The lease contained a proviso for re-entry on breach of any of the lessees' covenants. The buildings were never erected, but the plaintiffs accepted the quarter's rent which accrued next after the expiration of the twelve months limited for the erection of the buildings. The plaintiffs afterwards served upon the defendants a notice under the Conveyancing Act, 1881, s. 14, referring to the building covenant only, and calling upon the defendants to erect the buildings. In an action for recovery of possession:—

Held, that the building covenant was broken once for all at the expiration of the twelve months, and was not a continuing covenant; that the repairing covenant implied an obligation to erect the buildings, and there was, therefore, a continuing breach of it; but that inasmuch as the notice under the Conveyancing Act only referred to the building covenant as to the breach of which there was a waiver, and did not mention the breach of the repairing covenant, the notice was insufficient and the action failed. JACOB *v.* DOWN - - - - Stirling J. 156

—— Distress—Bill of exchange for rent—Debentures—Receiver - - - 731
See COMPANY. 11.

—— Minerals, Lease of service reserving—Tenant for life—Power of leasing 101, 206
See SETTLED LAND. 1, 2.

—— Rent, Non-payment of—Hotchpot clause—Absolute title of tenant - - 616
See WILL. 4.

LAPSE—Settlement of shares—Construction of will - - - - - 525
See WILL. 5.

LEASE.
See LANDLORD AND TENANT.

—— Merger—Agreement for lease—Life estate—Intention—Benefit - - 368
See MERGER. 1.

—— Minerals — Validity — Alienation of life estate - - - - 687
See SETTLED LAND. 3.

—— Mining lease—Tenant for life impeachable for waste—Open mines—Proportion of rent to be capitalised - - 804
See SETTLED LAND. 4.

LEASEHOLDS — Domiciled foreigner — Unattested will—Immovables—Administration with will annexed - - 504
See CONFLICT OF LAWS. 5.

LEGACY—Contingent legacy—Settlement estate duty—Incidence - - - 873
See REVENUE. 1.

—— Specific or demonstrative legacies—Construction of will - - - 756
See WILL. 6.

LETTERS PATENT - - - - 659
See PATENT. 3.

LEX REI SITÆ—Marriage—Domicil, change of — Immovable goods — French law — Community of goods — Statute of Frauds - - - - 410
See CONFLICT OF LAWS. 2.

LIEN—Solicitors'—Charging order—Property recovered for company—Application after winding-up—Delay - - 433
See SOLICITOR. 2.

—— Unpaid purchase-money—Vendor's lien—Personalty—Share of proceeds of sale
See VENDOR AND PURCHASER. 4. 462

—— Vendor's—Purchase of land by trustee of settled estates—Entry by tenant for life—Non-payment of principal - 736
See VENDOR AND PURCHASER. 7.

LIGHT — *Mortgagee — Power of Sale — Implied Easement—Injunction—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4, 5; *s.* 19—*Third Party Procedure—Co-Defendants—Builder—Severance of Defence—Costs—Indemnity—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 55.

Though a mortgagee when selling under the

LIGHT—*continued.*
statutory power of sale has not the same full power over the property as an absolute owner, he can convey the property to a purchaser with all the legal incidents accompanying the grant, and, on a sale of part of the property comprised in the mortgage, can give to the purchaser thereof an implied easement of light over the unsold portion.

In an action for an injunction against an adjoining owner and his builder to restrain an interference with light and for trespass, the builder severed in his defence from his employer and appeared separately at the trial, when an injunction was granted with costs against the defendant, the adjoining owner:—

Held, under the circumstances, that the builder was entitled to complete indemnity, and to an order for the payment of his solicitor and client costs by his co-defendant. BORN *v.* TURNER - - - - **Byrne J. 211**

2. —— *Obstruction—Injunction—Declaration—Rebuilding—Evidence of Intention to Preserve Ancient Lights — User — Interruption — Abandonment—Prescription Act*, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

In an action to restrain the obstruction of ancient lights in respect of premises which have been rebuilt, evidence of the plaintiff's intention to preserve ancient lights upon the rebuilding is unnecessary.

"Interruption" in s. 3 of the Prescription Act bears the same meaning as in s. 4, and refers to an adverse obstruction, and not to a mere discontinuance of user.

The question whether there has been an actual enjoyment of the use of light under the Prescription Act for the statutory period is a question of fact to be determined according to the circumstances of each case.

The plaintiffs, who had rebuilt their premises, claimed a right to ancient lights in respect of portions of three windows in the new building which coincided with portions of three windows in the old building. A great part of the coincident area had been, in the case of two of the windows, boarded up, and, in the case of the third window, covered with shelving, for more than a year before action brought; but the shelving allowed a substantial amount of light to pass through into the building:—

Held, that, as to the two first windows, there had been such a discontinuance of user as to prevent the acquisition of any right by the plaintiffs; secus as to the third.

In the circumstances of the case the Court made a declaration of the plaintiff's right in lieu of granting an injunction, the defendant undertaking to submit the plans of his proposed building to the plaintiffs. SMITH *v.* BAXTER **Stirling J. 138**

LIMITATIONS, STATUTE OF—Loan to husband — Bond by husband to trustees — Interest on - - - - **561**
See HUSBAND AND WIFE. 1.

—— Real property limitation—Rent, Non-payment of — Hotchpot clause — Absolute title of tenant - - - **616**
See WILL. 4.

LIQUIDATOR—Costs—Winding-up of company —Omission to file contract - **442**
See COMPANY. 13.

—— Court's power to appoint additional liquidator in voluntary winding-up - **728**
See COMPANY. 12.

—— Remuneration — Liquidator's solicitor — Costs—Petitioning creditor—Priorities
See COMPANY. 18. **289**

LOCAL GOVERNMENT — *Land acquired for Specific Purpose—Application of Part not required to another Permanent Purpose—Powers of Local Authority—Local Government Board—Jurisdiction—Injunction—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 175, 176.

Sect. 175 of the Public Health Act, 1875, which empowers the Local Government Board to direct that any lands acquired by a local authority in pursuance of any powers contained in the Act, and not required for the purpose for which they were acquired, shall not be sold, does not enable the Board to direct that those lands shall be applied permanently to any purpose inconsistent with the original purpose.

A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, and they will be restrained from so doing at the suit of the Attorney-General and the landowner from whom the land not required was purchased.

Decision of Kekewich J., [1900] 1 Ch. 51, affirmed. ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL - - **C. A. 377**

LONDON — *Streets and Highways — Widening Street—Power to take Part of House—Metropolis Management—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

A vestry requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act may be compelled by the owner to take the whole as a condition of taking the part, if the removal of the part will substantially injure the enjoyment of the house in the manner in which it was formerly enjoyed.

So *held* on the authority of *Gordon* v. *Vestry of St. Mary Abbotts, Kensington*, [1894] 2 Q. B. 742. GIBBON *v.* PADDINGTON VESTRY **Stirling J. 794**

LUNACY—*Charging Order—Shares — Judgment Debt—Form of Order—Costs — Maintenance of Lunatic—Scheme.*

A proper scheme for the maintenance of a lunatic having been made by a master, and it being found that the shares in question were not required for his maintenance, a judgment creditor is entitled to enforce his charging order on the shares by sale, notwithstanding that it had been obtained subsequently to the exercise of the jurisdiction of the Court in Lunacy. *In re* HUNT **C. A. 54, n.**

2. —— *Jurisdiction of Master—Appointment of Person to exercise Power of appointing New Trustees — Vesting Order — Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 116, *sub-ss.* 1 (*c*), 2; *ss.* 128,

LUNACY—*continued.*

129, 135—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 1.

By virtue of s. 27, sub-s. 1, of the Lunacy Act, 1891, a Master in Lunacy when, under s. 128 of the Lunacy Act, 1890, appointing a person to exercise a power of appointing new trustees which is vested in a person lawfully detained as a lunatic, has jurisdiction also, under s. 129, to make an order vesting the trust property in the new trustees when appointed. *In re* FULLER C. A. 551

—— Appointment of receiver—Lunatic—Rights of third parties - - - 462
See VENDOR AND PURCHASER. 4.

—— Foreign lunatic—English property—Curator—Right to sue in England—Order of foreign Court - - - 15
See CONFLICT OF LAWS. 1.

MAINTENANCE—Death of objects of fund—Unapplied surplus—Resulting trust for subscribers - - - - 326
See TRUST.

—— Infants—Contingent interests—Term for raising portions - - - 683
See INFANT.

—— Lunatic—Scheme - - - 54, n.
See LUNACY. 1.

—— Lunatic—Scheme—Creditors—Priority—Form of judgment - - - 15
See CONFLICT OF LAWS. 1.

MARRIAGE—*Validity—Capacity to Contract—Domiciled British Subjects—Jews—Prohibited Degrees of Consanguinity—Solemnization according to Jewish Rites—Lex Domicilii—Marriage Act*, 1835 (5 & 6 *Will.* 4, *c.* 54), *s.* 2—*Marriage Act*, 1836 (6 & 7 *Will.* 4, *c.* 85), *s.* 2—*Marriage Act*, 1840 (3 & 4 *Vict. c.* 72), *s.* 5.

The capacity of persons professing the Jewish religion who are also domiciled British subjects to contract marriage is regulated by the law of England.

Therefore, where a marriage was solemnized abroad according to Jewish rites between a niece and her maternal uncle, both the contracting parties being at the time of the solemnization domiciled British subjects and adherents of the Jewish faith, and the marriage being valid by the Jewish law:—

Held, that the marriage was invalid. *In re* DE WILTON. DE WILTON *v.* MONTEFIORE Stirling J. 481

—— Domicil, Change of—Immovable goods—French law—Lex rei sitæ—Community of goods—Statute of Frauds - 410
See CONFLICT OF LAWS. 2.

—— Nullity of—Consular marriage in France—Frenchman and Englishwoman—Validity - - - - 262
See CONFLICT OF LAWS. 3.

MARRIAGE SETTLEMENT.
See SETTLEMENT.

MARRIED WOMAN.
See Cases under HUSBAND AND WIFE.

MEETING—Notices—Directors' meeting—Essential formality - - - 230
See COMPANY. 14.

—— Shareholders' meeting—Resolution—Evidence—Declaration of chairman - 419
See COMPANY. 7.

MEMORANDUM OF ASSOCIATION—Subscriber of—Liability to pay for shares—Issue of shares on different terms - - 56
See COMPANY. 9.

MERGER—*Agreement for Lease—Life Estate—Intention—Benefit—Tenant for Life.*

The principle applicable to the merger of charges in equity applies also to the merger of leases. The Court is guided by the intention; and, in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested.

If a tenant for life in remainder takes a beneficial lease or an agreement therefor, and subsequently becomes tenant for life in possession, the presumption is against merger in equity. INGLE *v.* VAUGHAN JENKINS - - Farwell J. 368

2. —— *Legal Estate—Equitable Interest—Intention—Vendor and Purchaser—Estate of Vendor—Expressed Grant of Fee—Leasehold Title in Equity—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 63.

H. was entitled to certain houses for a term of ninety-nine years (less one day) by way of mortgage from W. W. was entitled to the property for the original term subject to the mortgage, and H. was entitled to the reversion in fee expectant on the determination of the original term. Under these circumstances W. conveyed the property to H. for the unexpired residue of the original term, and H. covenanted to indemnify W. against the rents and covenants in the lease and the principal and interest secured by the mortgage. H. afterwards conveyed by way of sale to W. in fee, the conveyance being expressly "subject to and with benefit of the lease," and W. then conveyed to the plaintiffs in fee "subject to and with benefit of the lease." H. subsequently purported to convey by way of mortgage in fee to the defendant, who had no notice of the plaintiffs' title:—

Held, that whether the original term had merged in the reversion or not, yet, inasmuch as H. and W. had dealt with one another on the footing that the term was to be deemed in existence, it would be inequitable to allow it to be treated as at an end. H. had therefore, when he purported to convey the fee to the defendant, an equitable estate to the extent of the leasehold interest, which, under s. 63 of the Conveyancing Act, 1881, passed to the defendant, and the plaintiffs were bound to give effect to it.

The question whether two equitable estates are merged or not is one of intention. Whether this rule applies where a merger of legal estate has actually taken place, *quære*. THELLUSSON *v.* LIDDARD - - - - Stirling J. 635

METROPOLIS.
See LONDON.

MINES—*Subsidence—Injury to adjoining Lands and Buildings—Liability of Owner — Damage caused by Act of Owner's Predecessor in Title.*

The owner of minerals is not liable for damage caused to neighbouring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession.

Greenwell v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165, followed.

Darley Main Colliery Co. v. *Mitchell*, (1886) 11 App. Cas. 127, considered. HALL *v.* DUKE OF NORFOLK - - - Kekewich J. 493

—— Lease of minerals—Validity—Alienation of life estate - - - 687
See SETTLED LAND. 3.

—— Mining lease—Tenant for life impeachable for waste—Open mines—Proportion of rent to be capitalised - - 804
See SETTLED LAND. 4.

—— Tenant for life—Lease of surface reserving minerals—Power of leasing - 101, 206
See SETTLED LAND. 1, 2.

MISDESCRIPTION—Conditions of sale—Clause excluding compensation—Specific performance—Possessory title - 858
See VENDOR AND PURCHASER. 1.

MISFEASANCE—Director—Improper allotment of shares to director at undervalue—Measure of damage - - 305
See COMPANY. 5.

MORTGAGE—*"Clog" on Redemption—"Tied" Public-house—Mortgage of Leasehold Public-house—Covenant by Mortgagor to take Beer during the Term from Mortgagee only.*

The rules "once a mortgage always a mortgage," and that the equity of redemption of a mortgage must not be "clogged," are still in force, and the meaning of them is that a mortgagor on payment of the debt secured by the mortgage is entitled to have the mortgaged property restored to him in its entirety, unfettered, and undiminished in value.

In a mortgage of a leasehold public-house by a licensed victualler to brewers the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not during the continuance of the term, and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees:—

Held, that this covenant was a "clog" on the equity of redemption, and that the plaintiff, on payment of all that was due upon the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the "tie."

Decision of Cozens-Hardy J., [1900] 1 Ch. 213, affirmed.

Santley v. *Wilde*, [1899] 2 Ch. 474, explained and distinguished. RICE *v.* NOAKES & Co. C. A. 445

2. —— *Foreclosure — Redemption — Solicitor Mortgagee—Profit Costs—Mortgagees Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 3—*Retrospective Effect.*

In April, 1893, upon a foreclosure summons by a solicitor mortgagee, an order was made directing an account of what was due to the plaintiff for principal, interest, and taxed costs of the action, followed by provisions for redemption by one of the defendants on payment of what should be found due, and foreclosure in default of payment. On February 19, 1898, on the further consideration of the action, an order was made referring it to the taxing master to tax the plaintiff's costs of the action:—

Held, that the rights of the parties were ascertained by the first order, which must be construed by the then existing law, and that the plaintiff was not entitled, by reason of the passing of the Mortgagees Legal Costs Act, 1895, to charge profit costs.

Decision of Cozens-Hardy J. affirmed. DAY *v.* KELLAND - - - - C. A. 745

3. —— *Receipt in the Body thereof — Mortgagor's Signature induced by Fraud of his Solicitor —"Non est factum"—Estoppel—Title of Mortgagee—"Solicitor"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 54, 56.

Two trustees advanced money on a mortgage of realty. S., one of the trustees, paid the money to E., a solicitor, who produced to him the mortgage deed executed by K. as the mortgagor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K. who was not a man of much education, and employed E. from time to time in relation to his property, and had implicit confidence in E., had signed the deed on his advice, but did not know that it was a mortgage and had not instructed E. to obtain a mortgage. E. misappropriated the money and absconded. On discovery of the fraud K. brought an action against the trustees to set aside the mortgage:—

Held, that under the circumstances K. was estopped by his conduct from denying (1) that the mortgage was valid, and (2) that E. had authority to receive the mortgage money.

The expression, "a solicitor" who produces a deed, in s. 56 of the Conveyancing Act, 1881, discussed.

Dictum of North J. in *Day* v. *Woolwich Equitable Building Society*, (1888) 40 Ch. D. 491, questioned. KING *v.* SMITH - Farwell J. 425

—— Light — Implied easement — Mortgagee — Power of sale - - - 211
See LIGHT. 1.

—— Tenant for life — Application of capital moneys—Discharge of incumbrances
See SETTLED LAND. 3. 678

NAME—Firm name — Conveyance of freehold shop — Vendor's name over door — Vendor's right to erasure - - 698
See PARTNERSHIP. 1.

NOTICE—Breach of covenant to build—Repairs—Sufficiency of notice—Relief against forfeiture - - - - 56
See LANDLORD AND TENANT.

NOTICE—*continued.*

—— Meeting, Directors' — Notices — Essential formality - - - - 230
See COMPANY. 14.

—— Purchaser with notice—Contract to give "first refusal" of land — Interest in land—Injunction - - - 352
See CONTRACT.

NUISANCE—*Adjoining Premises—Alterations—Reasonable Use of a Building—Injunction.*

In considering cases of nuisance between owners of adjoining houses the Court will have regard to the question whether the person alleged to have created the nuisance is making a reasonable use of his property.

Observations of Kekewich J. in *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685, 690, questioned. SANDERS-CLARK *v.* GROSVENOR MANSIONS COMPANY AND G. D'ALLESSANDRI - **Buckley J. 373**

NULLITY — Consular marriage in France — Frenchman and Englishwoman — Validity of ceremony - - - 262
See CONFLICT OF LAWS. 3.

NUNCUPATIVE WILL—Validity - - 812
See DONATIO MORTIS CAUSÂ.

OUTGOINGS—Railway company—Judgment debt —Receiver and manager—Preferential payments—Priority - - 436
See RAILWAY.

PARCELS—Conveyance, Form of—General words —Summons—Practice - - 595
See VENDOR AND PURCHASER. 3.

PARTITION—*Real Estate — Conversion—Partition Action — Sale — Distribution — Payment to Trustees having Power of Sale—"Persons absolutely entitled"—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act*, 1856 (19 & 20 *Vict. c.* 120), *s.* 23.

Real estate was sold in a partition action, and under an order, made in 1877, a share of the proceeds of sale was paid to the trustees of the will of a testator who had died possessed of the share. The will gave the trustees a power of sale exercisable with consent of the tenant for life, but did not authorize them to invest in the purchase of lands. One of the beneficiaries under the will died intestate:—

Held, that his share devolved on his legal personal representative and not on his heir.

In re Hobson's Trusts, (1878) 7 Ch. D. 708, has not been overruled by *In re Smith*, (1888) 40 Ch. D. 386. *In re* MORGAN. SMITH *v.* MAY **Stirling J. 474**

PARTNERSHIP—*Goodwill—Partner's Covenant — Restriction against Trading — Assignment of Goodwill—Benefit of Covenant—Firm Name—No express Assignment—Vendor and Purchaser—Conveyance of Freehold Shop—Vendor's Name over Door—Vendor's Right to Erasure.*

The benefit of a partner's covenant not to carry on a similar business to that of the partnership during a fixed period from the commencement thereof passes by an assignment of the goodwill of the partnership.

PARTNERSHIP—*continued.*

Jacoby v. *Whitmore*, (1883) 49 L. T. 335, applied.

Unless the right to use the firm name is expressly assigned, the assignee of the goodwill must not use the name so as to expose any partner to liability.

Semble, if the firm name merely consists of the surname of a partner with the addition of the words "& Co.," and the partner has not used the firm name as his own except in connection with the firm, there is no appreciable risk that its user will expose him to liability.

Burchell v. *Wilde*, [1900] 1 Ch. 551, applied.

A purchaser bought a freehold shop with the vendor's name carved thereon, but did not use the name in his business:—

Held, that the vendor could not compel him to erase it. TOWNSEND *v.* JARMAN **Farwell J. 698**

2. —— *Goodwill—Sale of Business—Soliciting Customers.*

One of two partners bought out the other under their articles. The articles provided that the outgoing partner might set up a similar business in the neighbourhood:—

Held, that the proviso was merely declaratory, and did not authorize solicitation of old customers GILLINGHAM *v.* BEDDOW - **Cozens-Hardy J. 242**

PATENT—*Infringement — Foreign-made Article —Evidence—Presumption—Injunction—Damages —Alternative Relief.*

In an action by patentees of an article exclusively manufactured abroad, claiming an injunction and damages for the user of the patented article in England, the only evidence of infringement adduced was that of an expert, who deposed that the plaintiffs' patents related to three separate and distinct modes of producing the article in question; that it was not possible to tell, from an examination of any particular parcel, under which process it had been produced, but that it must have been produced under one or other of these three processes. The defendant called no evidence, and claimed a nonsuit:—

Held, that the plaintiffs were not entitled to any injunction, as they had not proved that any particular patent had been infringed. On the question of damages, the Court found as a fact that the plaintiffs' patents covered every possible mode of producing the patented article, and that one of these patents must therefore have been infringed, and that the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed. An inquiry was therefore directed, without mentioning any particular patent, whether any and what damages had been sustained by the plaintiffs by reason of the user by the defendant of the patented article.

Semble: It is not always essential to establish the particular alternative under which relief is claimed, provided that the rights of the plaintiff and the obligations of the defendant are identical under each of the alternatives, and that the alternatives exhaust every possible contingency and are mutually exclusive. SACCHARIN CORPORATION, LIMITED *v.* QUINCEY **Cozens-Hardy J. 246**

PATENT—*continued.*

2. —— *Joint Grant — Survivorship — Sale — Agreement—Assignment — Covenants for Title—Construing Covenants as joint or joint and several—Deceased Grantee—Legal Personal Representative—Concurrence of, in Assignment—Practice—Action—Counter-claim—Separate Causes of Action—Appeal—Cross-notice—Cross-appeal—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 6.

In 1882 letters patent were granted to L. and J. in the then usual form of grant to two patentees, namely, to them, "their executors, administrators, and assigns," to the end that L. and J., "their executors, administrators, and assigns, and every of them" should have and enjoy the full benefit and sole use and exercise of the patented invention. This and other patents granted to L. and J. in the same form had been taken out with a view to selling them and sharing the profits of sale. By an agreement under seal made in 1883 between L. and J. of the one part, and the plaintiff company of the other part, the former agreed to sell, assign and transfer to the latter all the patents. Clause 7 thereof was as follows: "The assignment and transfer of the said letters patent . . . . shall be prepared by and at the costs of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of" the purchase-money, "and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned . . . . are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made." L. died in 1888, and after his death, the patents not having yet been assigned, though the purchase-money had, it was alleged, been paid, the company brought an action against J. and the administratrix of L., claiming (1.) an order on the defendants to assign the patents; (2.) damages for breach of the agreement and of the warranty therein contained; and (3.) repayment of part of the purchase-money on the ground that some of the patents had been declared invalid. L.'s administratrix then counter-claimed for payment by the company of a sum alleged to be due to her upon the agreement under a judgment pronounced by the French Court in an action brought against her in France by the company in 1889, the judgment being based upon the ground that as L.'s administratrix she had, under the agreement, separate rights against the company. At the trial of the English action and counter-claim, Cozens-Hardy J. dismissed both, [1899] 2 Ch. 289, 301, on the grounds (1.) that L.'s administratrix had no interest in the patents inasmuch as the interest created by the form of grant in each case was a joint interest only, so that J. took the whole by survivorship; and (2.) that the obligation created by clause 7 of the agreement was only a joint—not joint and several—covenant to assign the patents and to covenant in the assignment for their validity, and that therefore L.'s

PATENT—*continued.*

administratrix was not bound to enter into any covenant. On appeals by both the company and L.'s administratrix:—

Held, by the Court of Appeal, reversing the decision of Cozens-Hardy J., [1899] 2 Ch. 289, that the obligation created by clause 7 was that L. and J. had jointly covenanted to assign the patents, and that the assignment should contain joint and several covenants by them that the patents were valid, and that the company was entitled to relief against L.'s administratrix on that footing: also that L.'s administratrix was entitled on her counter-claim to have the amount alleged to be due to her under the French judgment ascertained.

A cross-notice under Rules of Supreme Court, 1883, Order LVIII., r. 6, by the respondent to an appeal can only be given in relation to the subject-matter of the action, and cannot be extended to some other matter not the subject of the action. For example, where an action and counter-claim founded on separate and distinct causes of action have each been dismissed with costs, and the plaintiff on the counter-claim appeals, it is irregular for the plaintiff in the action, that is, the respondent to the appeal, if he desires to appeal also, to give a cross-notice under Rules of Supreme Court, 1883, Order LVIII., r. 6. In such a case, the causes of action being separate and distinct, his proper course is to bring a cross-appeal and not to give a cross-notice. NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS *v.* GIBBS **C. A. 280**

3. —— *Letters Patent—Construction—"Exercise"—English Sale—Delivery Abroad.*

An English merchant, who, in pursuance of a contract made in England, delivers a patented article at a foreign port to an English importer, does not make, use, exercise, or vend the protected invention within the realm. SACCHARIN CORPORATION *v.* REITMEYER & CO.

Cozens-Hardy J. 659

—— Discovery—Patent action—Account of profits—Disclosure of names of customers
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PENALTY—Loan to husband—Bond by husband to trustees — Interest on—Statute of Limitations - - - - **561**
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—— Tenant for life, Person having powers of—Title-deeds—Custody - - **778**
See SETTLED LAND. 5.

POSSESSORY TITLE—Conditions of sale—Misdescription — Clause excluding compensation—Specific performance **858**
See VENDOR AND PURCHASER. 1.

POWER—*Appointment, General Power of—Power to be exercised by Will attested by two Witnesses—Donee of the Power a domiciled Frenchwoman—*

POWER—*continued.*

Holograph Will of Donee in French Language unattested.

A testator by his will dated in 1822 bequeathed the residue of his personal estate to trustees upon trust for his children in equal shares, the shares of such of them as were daughters to vest in them at twenty-one, but to be retained by the trustees upon trust to pay the income to such daughters for their lives, and, after the decease of each daughter, to pay the principal and the accumulation (if any) of the dividends "to such person or persons, upon such trusts and for such intents and purposes, as she by her last will and testament in writing, or any writing in the nature of, or purporting to be, her last will and testament, or any codicil or codicils thereto to be respectively executed by her in the presence of and attested by two or more credible witnesses, shall, notwithstanding her coverture, direct, or appoint, or give, or bequeath the same; and, in default of any such direction or appointment, gift, or bequest, unto such person or persons as at the time of her decease shall be her next of kin."

The testator died in 1824. The plaintiff, who was one of the daughters of the testator and a domiciled Frenchwoman, by her will dated in 1894, and two codicils dated in 1899, all in the French language and all unattested, made divers bequests, and died in November, 1899.

The will and codicils were admitted to probate, being good in accordance with French law, but invalid according to English law:—

Held, upon the petition of the surviving daughter of the testatrix, who claimed to be her sole next of kin, for payment out of a sum of bank stock standing to the account of the plaintiff, that the will of the testatrix did not operate as a good execution of the power contained in the will of her father, not having been executed in accordance with the formalities required by the will.

It is not enough where special formalities are required by the instrument creating the power that the instrument purporting to execute the power should be a will according to the law of domicil, but in cases where the provisions of the Wills Act do not apply the will must comply with the terms of the power.

In re Price, [1900] 1 Ch. 442, and *In re Kirwan's Trusts*, (1883) 25 Ch. D. 373, considered. BARRETTO *v.* YOUNG - - **Byrne J. 339**

2. —— *Appointment, Limited Power of—Will giving the Power dated subsequently to Will purporting to execute the Power—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 24, 27.

H. H. the younger, by his will dated in 1884, gave all the residue of his property over which at the time of his death he should have a disposing power to trustees upon trust for sale and conversion, and directed them to pay the yearly income arising from his trust estate to his wife for life or widowhood.

H. H. the elder, father of H. H. the younger, by his will dated in 1893, empowered each child of his by his or her will, or any codicil thereto, to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share of his (the testator's) residuary estate for the life of such wife or husband, and directed that a sum of 4000*l.* thereby directed to be raised should be held upon the same or the like trusts and subject to the same or the like powers and provisions as were thereinbefore declared with respect to the share of H. H. the younger in the residue. H. H. the elder died in 1895, and H. H. the younger in 1899 leaving a widow and three children. H. H. the younger had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father:—

Held, that the will of H. H. the younger did not operate as a valid appointment under the power conferred upon him by the will of his father.

Stillman v. *Weedon*, (1848) 16 Sim. 26, discussed and considered. *In re* HAYES. TURNBULL *v.* HAYES - - - **Byrne J. 332**

—— Estate duty—Incidence—Will in exercise of power of appointment—Direction to pay testamentary expenses - **648**
See WILL. 9.

PRACTICE—*Costs—Higher Scale—Allegations of Fraud—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 9.

An allegation of fraud is not in itself a special ground, within the Rules of the Supreme Court, 1883, Order LXV., r. 9, sufficient to enable the Court to order costs to be paid on the higher scale, although the action be one which involves a great deal of investigation and a lengthy trial. ASSETS DEVELOPMENT COMPANY *v.* CLOSE BROTHER & CO. - - **Buckley J. 717**

2. —— *Discovery—Patent Action—Account of Profits—Disclosure of Names of Customers.*

In an action for the infringement of a patent the defendants were ordered to account for profits:—

Held, that the defendants must disclose the names and addresses of their customers.

Powell v. *Birmingham Vinegar Brewery Co.*, (1896) 14 Rep. Pat. Cas. 1, followed. SACCHARIN CORPORATION *v.* CHEMICALS AND DRUGS COMPANY **C. A. 556**

3. —— *Discovery—Production of Documents—Privilege—Bills of Costs—Correspondence between Solicitor and Client relating to Litigation—Records of Proceedings at Chambers—Rules of Supreme Court, Order* XXXI., *r.* 19*a*.

Mere records of what takes place in chambers in the course of a hostile litigation in the presence of parties on both sides are not privileged from production. There is no distinction, for this purpose, between proceedings in chambers and proceedings in open court.

Correspondence which is protected on the ground of professional privilege is not rendered liable to discovery merely because it contains statements of fact as to what has taken place in chambers in the course of hostile litigation and in the presence of parties on both sides.

Where privilege was claimed for certain entries in bills of costs relating to litigation on the ground that they were copies of or extracts from notes or memoranda made by the solicitor

PRACTICE—*continued.*

pending the litigation for the purpose of enabling him to conduct the litigation on his client's behalf, and there was nothing in the affidavit by which privilege was claimed inconsistent with the entries being mere notes by the solicitor or his clerk of what had taken place in chambers in the presence of both parties, the Court exercised its discretion under Order XXXI., r. 19*a*, to open and inspect the sealed entries. AINSWORTH *v.* WILDING **Stirling J. 315**

4. —— *Evidence — Affidavit — "Information and Belief" — Irregularity — Inadmissibility — Costs — Rules of Supreme Court*, 1883, *Order XXXVIII., r.* 3.

An affidavit of information and belief, not stating the source of the information or belief, is irregular and therefore inadmissible as evidence, whether on an interlocutory or a final application; and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs. *In re* J. L. YOUNG MANUFACTURING COMPANY. YOUNG *v.* J. L. YOUNG MANUFACTURING COMPANY **C. A. 753**

5. —— *Interrogatories — Answer by Officer of Company—Rules of Supreme Court, Order XXXI., rr.* 1, 5, 24.

An officer of a company, answering on their behalf interrogatories administered to them in an action, is only bound to answer as to his knowledge acquired in the course of his employment by the company, and as to the result of inquiries made by him of the other officers and agents of the company with regard to their knowledge acquired in the same way.

He is not bound to answer as to his own knowledge, or to make inquiries of the other officers or agents of the company as to their knowledge, acquired accidently or in some other capacity.

The answer of an officer of a company on their behalf, being their answer, can be read against them, and they can only be required to answer as to that, with respect to which an individual litigant in their position would have been bound to answer. WELSBACH INCANDESCENT GAS LIGHTING COMPANY *v.* NEW SUNLIGHT INCANDESCENT COMPANY - - **C. A. 1**

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—— Service of notices to pave, &c., on vendor before sale — Non-disclosure to purchaser - - - - 625
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—— With notice—Contract to give "first refusal" of land—Interest in land—Injunction
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RAILWAY—*Receiver and Manager—Preferential payments—Priority—Working Expenses—Proper Outgoings—Damage caused by Defective Plant—Compensation—Costs—Judgment Debt—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

A judgment debt for damages caused to the property of a person using a railway by the neglect of the railway company to keep its plant in proper repair is not a working expense or other proper outgoing of the railway within the meaning of s. 4 of the Railway Companies Act, 1867, so as to be entitled to priority over other debts payable by a receiver and manager appointed under that section.

The costs carried by the judgment stand on the same footing as the damages in this respect.

The priority given by the section is confined to working expenses and other proper outgoings without which it would be impossible to carry on the railway. It does not extend to claims for compensation or other claims, the non-payment of which, though probably leading to a decline in traffic, would not absolutely paralyze the undertaking.

In re Eastern and Midlands Ry. Co., (1890) 45 Ch. D. 367, *In re Wrexham, Mold and Connah's Quay Ry. Co.*, [1900] 1 Ch. 261, and *In re Navan and Kingscourt Ry. Co.*, (1885) 17 L. R. Ir. 398, followed. *In re* WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY - Farwell J. 436

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REVENUE—*Estate Duty—Settlement Estate Duty — Incidence — Contingent Legacy — Contingent Annuity—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 7, 9, 14, 22—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

The testator by his will gave certain legacies and annuities, some of which were contingent upon the legatees and annuitants attaining the age of twenty-one. He directed that every legacy and annuity should be primarily payable out of his personalty, and charged his real estate in aid, but not in exoneration, of his personalty with the same, if the personalty should be insufficient. He devised his real estate to the use of his eldest son for life with remainders over. He declared that if his residuary personalty should be insufficient for payment of his funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits, and not by raising a capital sum to provide for the same; and he charged the residuary personalty with the payment of the legacies and annuities, and directed that the ultimate residue of the personalty should be invested and should follow the limitations of the real estate. After the testator's death the executors had paid settlement estate duty in respect of the contingent legacies and annuities. There was a probability that the personal estate would be insufficient to pay the funeral and testamentary expenses, legacies, and annuities. The question having arisen as to how the settlement estate duty ought to be borne as between the residuary estate and the legatees and annuitants:—

Held, (1.) that the contingent legacies must be treated as settled, and, having regard to the decision in *In re Maryon-Wilson*, [1900] 1 Ch. 565, the duty must be borne by the legatees; and (2.) as regarded the annuities, that the decision in *Attorney-General* v. *Owen*, [1899] 2 Q. B. 253, applied to the personalty, and consequently the

REVENUE—*continued.*

annuitants must bear their proper proportion of the settlement estate duty in accordance with the rule laid down in *In re Parker-Jervis*, [1898] 2 Ch. 643. *In re* DUKE OF ST. ALBANS. LODER *v.* DUKE OF ST. ALBANS - Stirling J. 873

2. —— *Estate Duty—Settlement Estate Duty—Incidence—Express Provision to the Contrary—"All Duties payable by Law out of my Estate"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1 (*a*); *Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

A testatrix, who died in 1899, after giving a specific legacy on trust by way of settlement, directed that her debts, funeral and testamentary expenses, "including all duties payable by law" out of her estate, and including the duties on certain annuities given by her will, and on all legacies bequeathed by her duty free, should be paid out of funds which she designated. She then directed certain legacies to be paid out of these funds free of duty:—

Held, that the special direction in the will for payment of duties payable by law out of the testatrix's estate referred to duties which by law were payable out of the general residuary estate of the testatrix, and not to duties which by law were made payable out of specific property, and that therefore the direction did not amount to such an express provision as was required by s. 19 of the Finance Act, 1896, in order to make the settlement estate duty payable otherwise than out of the settled legacy:

Held, accordingly, that the settlement estate duty payable in respect of the settled legacy must be paid thereout. *In re* LEWIS. LEWIS *v.* SMITH Kekewich J. 176

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—— Leases and sales of real estate—Conversion—Sale — Payment to trustees having power of sale—Persons absolutely entitled - - - - 474
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SETTLED LAND—*Leasing, Power of—Lease of Surface reserving Minerals—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 13, 17.

Under the power to lease settled land conferred on a tenant for life by s. 6 of the Settled Land Act. 1882, a lease may be made of the surface of land reserving the mines and minerals beneath it.

Decision of Kekewich J. in *In re Newell and Nevill's Contract*, [1900] 1 Ch. 90, disapproved. *In re* GLADSTONE. GLADSTONE *v.* GLADSTONE
C. A. 101

2. —— *Leasing, Power of—Lease of Surface reserving Minerals—Tenant for Life.*

Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, and also power to lease mines of coal, iron, or other materials, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.

Cockerell v. *Cholmeley*, (1830) 10 B. & C. 564, discussed and distinguished. *In re* DUKE OF RUTLAND'S SETTLED ESTATES. DUKE OF RUTLAND *v.* MARQUIS OF BRISTOL - Byrne J. 206

3. —— *Mining Leases — Tenant for Life—Alienation of Life Estate—Powers of Leasing—Lease of Minerals—Rents varying with Selling Price of Minerals gotten — Statutory Powers — Validity of Leases — Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 9, 11, 56—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 8.

When a person has under several instruments a power of appointment over the same subject-matter, and makes an appointment in exercise of "every power" enabling him in that behalf, the power first in point of time is exercised; and if effectually exercised there remains no subject-matter on which the other powers can operate. The Court may also consider which power is most beneficial to the donee of the power.

By a settlement made in 1876 estates were limited, in the events which happened, to A. for life, remainder to B. for life, with remainders over. The settlement contained a power for every person "as and when he should be entitled to the possession or the receipt of the rents and profits" of the settled estates, to grant mining leases reserving the best rents or royalties "by the acre, ton, or otherwise" without taking any fine or premium. During A.'s life B. absolutely alienied his reversionary life interest for value. A. died in 1882. Between the coming into operation of the Settled Land Act, 1882, and of the Settled Land Act, 1890, and after the later Act, B. granted mining leases reserving rents varying with the selling price of the minerals gotten, which was in accordance with the custom of the county. All the leases were granted in exercise of "every power" enabling B. in that behalf. Questions having arisen as to the validity of the leases, and whether they were granted under the power in the settlement or under the power in the Settled Land Acts:—

Held, (1) that it was competent for B. to exercise the power of leasing in the settlement notwithstanding that he has aliened his life estate; and (2) that the reservation of rents varying with the selling price of the minerals was within the power and valid:

Held, also, that the leases were granted under the power in the settlement, which was first in point of date, and not under the power in the Settled Land Acts:

Held, further, that, assuming the leases were granted under the Settled Land Acts, the "conflict referred to in s. 56 of the Act of 1882 means a conflict between provisions connected with the execution of the power—e.g., the consent of a third party—and not with the result or subject-matter of the power. EARL OF LONSDALE *v.* LOWTHER - - - - Farwell J. 687

4. —— *Mining Lease—Tenant for Life Impeachable for Waste—Open Mines—Proportion of Rent to be Capitalized—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 11,

A tenant for life under the Settled Land Act, 1882, of mineral land, though not declared unimpeachable for waste by the settlement, is not as regards open mines "impeachable for waste in respect of minerals" within s. 11, and may therefore grant a lease of such mines upon the terms of setting aside one-fourth only of the rent as capital money arising under the Act. *In re* CHAYTOR - - - - Stirling J. 804

SETTLED LAND—*continued.*

5. —— *Person having Powers of Tenant for Life—Tenant for Life subject to Term for securing Incumbrances—Possession—Title-deeds—Custody—Sale—Application of Capital Moneys—Discharge of Incumbrances—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 53.

Land which was subject to mortgages was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A. for life, with remainders over. The trusts of the term provided that so long as the mortgages remained unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest of the mortgage debts and certain rent-charges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of 600*l.* a year, and should apply the residue of the rents and profits towards the payment of the principal moneys charged by the mortgages, and there was a proviso for the cesser of the term upon the discharge of the mortgage debts. The settlement conferred on the trustees an immediate power of sale and exchange, but no power of leasing:—

The Court, having held that A. was a person having the powers of a tenant for life under the Settled Land Act, 1882, ordered him to be let into possession upon his undertaking to perform the trusts of the term, and gave him the custody of the title-deeds.

The Court would have made the order apart from the annuity to A.

A. subsequently contracted to sell, under the powers of the Settled Land Acts, certain portions of the settled lands, including parts of all the mortgaged lands and a portion which was unincumbered, and in order to complete the sale it was necessary that the mortgages should be paid off. A. therefore directed that the trustees should apply the proceeds of the sale in paying off the mortgages. He deposed that he considered that this would be for the benefit of all the parties entitled under the settlement, seeing that the mortgages bore interest at 4 per cent., whereas the purchase-money could not be invested in trustee securities to yield more than 3 per cent. Upon a summons to determine whether the mortgages ought not to be kept on foot for the benefit of the ultimate remainderman:—

Held, that the beneficiaries under the settlement took subject to the power of sale conferred on the trustees, and that inasmuch as the trustees in the exercise of that power might properly, for the purpose of carrying into effect a beneficial sale, pay off the existing incumbrances out of the purchase-money, a tenant for life doing the same thing under the powers of the Settled Land Acts ought not to be held to be acting unjustly towards the remaindermen; that consequently the mortgages ought not to be kept on foot, and that upon the payment off out of the capital moneys of all the mortgages the term would cease.

Semble, the Court would have arrived at the same conclusion if the settlement had conferred no power of sale upon the trustees. *In re* Richardson. Richardson *v.* Richardson. *In re* Richardson. Richardson *v.* Richardson
Stirling J. 778

SETTLED LAND—*continued.*

6. —— *Possession—Tenant for Life—Term—Trust for Management and Accumulation—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7; *s.* 53; *s.* 58, *sub-s.* 1, *cls.* (vi.) (ix.)

A portion of family estates was subject to a term, created in 1868, in trustees to manage and apply the net income in paying off mortgages, on which large sums were still due. The Court put the tenant for life into possession of the land subject to the term, he giving security to pay the net income over to the trustees. *In re* Money Kyrle's Settlement. Money Kyrle *v.* Money Kyrle - - - **Cozens-Hardy J. 839**

7. —— *Postponement of Sale—Interim Rents—Enjoyment in Specie—Tenant for Life and Remainderman—Settlement by way of Trust for Sale—Conversion—Real Estate—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63.

Where by a will or settlement property is directed to be sold and converted and the proceeds held in trust for one for life and then for others, and, either in exercise of a power of postponement or without any impropriety, the sale is postponed, the person entitled to the life interest in the proceeds is, as regards real estate, entitled to the rents and profits thereof until sale, and is consequently to be deemed to be the tenant for life thereof within s. 63 of the Settled Land Act, 1882.

Yates v. *Yates*, (1860) 28 Beav. 637, considered. *In re* Searle. Searle *v.* Baker
Kekewich J. 829

—— Conversion—Partition action—Sale—Distribution.
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—— Infants — Maintenance — Contingent interests—Term for raising portions **683**
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—— Trustee's right of indemnity—Purchase of land by trustee of settled estates—Entry by tenant for life—Non-payment of principal - - - - **736**
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SETTLEMENT—Estate duty—Incidence—Contingent legacy—Contingent annuity
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—— Estate duty—Incidence—Express provision to the contrary - - - **176**
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—— Loan to husband—Bond by husband to trustees—Interest on—Statute of Limitations - - - - **561**
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See Cases under Settled Land.

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SEVERANCE — Third party procedure — Co-defendants — Builder — Costs — Indemnity - - - - - 211
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See Cases under COMPANY.

SIGNATURE — Receipt — Mortgagor's signature induced by fraud of his solicitor—"Non est factum"—Estoppel—Title of mortgagee - - - - 425
See MORTGAGE. 3.

SOLICITOR—*Confidential Relation—Benefit conferred by Client on Solicitor or his Near Relation—Solicitor and Client—Duty of Solicitor—Independent Advice.*

The plaintiff claimed to have a deed of 1891 set aside by which she, in exercising with her husband (since deceased) a joint power of appointment, had conferred a benefit on the son of a solicitor who was acting for her husband in the transaction, but who had not been retained by her. The solicitor was also a trustee under a deed of 1890 by which the power had been created. He explained the effect of the deed of 1891 to the plaintiff, and also suggested that she should consult an independent solicitor; but he did not inform her that she was under no obligation to execute the deed, and that it was so adverse to her interest that she ought not to execute it without having independent advice, and she executed the deed without having that advice:—

Held (differing from Cozens-Hardy J., [1899] 2 Ch. 578, on a conclusion of fact), that a confidential relation existed between the plaintiff and the solicitor, and that therefore it was his duty not only to explain the deed to her, but also to take care that she did not execute it without having independent advice as to her position and her rights:

Held, therefore (reversing the decision of Cozens-Hardy J.), that the plaintiff was not bound by the deed of 1891, and that it must be set aside. BARRON *v.* WILLIS - C. A. 121

2. —— *Costs—Lien—Charging Order—Fund in Court—Property recovered for Company—Application after Winding-up—Delay—Discretion—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Delay by a solicitor in applying under s. 28 of the Solicitors Act, 1860, for an order charging his costs on property recovered by him is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.

Solicitors employed by a limited company recovered a claim against an estate in course of administration by the Court. The company was subsequently wound up by the Court. Shortly after the winding-up order was made, the solicitors applied for an order charging their costs on the company's share of the fund in court to the credit of the administration action:—

Held, that, as the charging order in this case conferred no new right, but was only a cheap and speedy mode of enforcing the common law lien on the company's share of the fund in court, which lien existed prior to the winding-up, the Court, in the exercise of its discretion under the

SOLICITOR—*continued.*

statute, would make the order. *In re* BORN. CURNOCK *v.* BORN - - Farwell J. 433

3. —— *Costs — Taxation — Translations — Foreign documents—Administration.*

Charges for translations of foreign documents made in a solicitor's office allowed in taxing costs relating to administration. *In re* BOWES. EARL OF STRATHMORE *v.* VANE Cozens-Hardy J. 251

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—— Receipt—Mortgagor's signature induced by fraud of his solicitor—"Non est factum"—Estoppel—Title of mortgagee - 425
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—— Solicitor mortgagee — Profit costs — Mortgagees Legal Costs Act—Retrospective effect - - - - 745
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7 Will. 4 & 1 Vict. c. 26, s. 9—*Wills* - 504
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TENANT FOR LIFE—*Tenant for Life and Remainderman — Conversion, Trust for — Discretionary Power of Postponement—Annual Produce until Conversion to be deemed Annual Income of Converted Fund—Reversionary Interest—Omission to Convert—Non-exercise of Discretion by Trustees—Right of Tenant for Life—Rate of Interest.*

When property is given by will on trusts for conversion and investment, and to hold the investments on trust for a tenant for life and remaindermen, with a discretionary power to the trustees to postpone the conversion, and a provision that the income until conversion is to go to the tenant for life, that provision extends to property (such as a reversionary interest) which is not producing income as well as to property of a wasting character.

Mackie v. *Mackie*, (1845) 5 Hare, 70, followed. Decision of Stirling J. affirmed.

In adjusting the rights as between tenant for life and remaindermen in respect of a reversionary interest which ought to have been but was not converted by trustees:—

Held, that interest should be calculated at the rate of 3 per cent.

In re Goodenough, [1895] 2 Ch. 537, followed.

A testator bequeathed his personal estate to two trustees, upon trust for conversion and investment of the proceeds, and to pay the income of the investments to his sister during her life, and after her death to hold the capital on trusts for her children. But, if no child of the sister should attain a vested interest, the trust fund was to go to the two trustees beneficially, in equal moieties. The testator gave the trustees a discretionary power to postpone for such period as to them should seem expedient the conversion of any part of his personal estate, but the outstanding personal estate was to be subject to the trusts thereinbefore declared, and the yearly produce thereof was to be deemed annual income for the purpose of the trusts. At the time of the testator's death he had no property of a wasting character (except some leaseholds, as to which a special provision was made by his will), but he was entitled to a reversionary interest in a sum of Consols, subject to the life interest therein of his sister. When he died she was a spinster aged thirty-five. Ten years afterwards she was found a lunatic, and less than two years after that she died intestate. She had never married.

The trustees did not during her life sell the reversionary interest, and it fell in upon her death.

Held, by the Court of Appeal (upon evidence which was not before Stirling J.), that the trustees had never exercised their discretion as to the conversion of the reversionary interest, and that under the circumstances it ought to have been sold and the proceeds invested so as to produce income for the tenant for life:

Held, therefore, that the fund must be apportioned between the representative of the tenant for life and the remaindermen on the principle laid down in *In re Earl of Chesterfield's Trusts*, (1883) 24 Ch. D. 643, interest being calculated at the rate of 3 per cent. per annum. ROWLLS *v.* BEBB. *In re* ROWLLS. WALTERS *v.* SOLICITOR FOR THE TREASURY - - - C. A. 107

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TRADE-MARK—*Disclaimer—Old and New Marks—Registration — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 62, *sub-s.* 2; *s.* 64, *sub-s.* 2; *s.* 74—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 60), *ss.* 10-16.

If application for registration of an old trade-mark has to be made under sub-s. 2 of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888, there is no distinction in reference to disclaimer between new marks and old marks.

Where, under s. 62, sub-s. 2, application is made to register a trade-mark which was used by the applicant or his predecessors in business before August 13, 1875, it is not necessary in the application to state the names of the members of the firm for the time being since the alleged first user, nor even to insert the words "and their predecessors in business, members of the firm for the time being." *In re* WRIGHT, CROSSLEY & CO.'S APPLICATION AND ROYAL BAKING POWDER COMPANY OF NEW YORK - - **Byrne J. 218**

2. —— "*Invented Word*"—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10 (*d*).

To be registered as a trade-mark, an "invented word" need not be absolutely new, or invented for the purpose.

The word "Tachytype" had been used as part of the name of a foreign company who had advertised and made communications of patented inventions in their own name in England. An English company were allowed to register the word "Tachytype" as a trade-mark. *In re* LINOTYPE COMPANY'S TRADE-MARK, No. 220,858 **Cozens-Hardy J. 238**

TRADE UNION—*Restraint of Trade—Illegal Objects—Expulsion of Member—Jurisdiction of Court—Injunction—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4—*Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The rules of an association, called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers carrying on the business of warehousing tea in bond, provided (rule 11) that every member should charge on teas the respective rates and adhere to the terms and conditions specified in a schedule to the rules, and should not be at liberty to depart from them in any way, except that a discount not exceeding 10 per cent. might be allowed on the said rates. No other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement.

By rule 14, No subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member.

By rule 15, Any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee.

The committee passed a resolution expelling the plaintiffs for an alleged breach of the rules, and they brought an action against the members of the committee to restrain them from acting on the resolution, on the ground (inter alia) that the plaintiffs had not had an opportunity of being heard in their defence. Kekewich J. granted an interlocutory injunction:—

Held, on appeal, that the association was a "trade union" within the meaning of s. 16 of the Trade Union Act Amendment Act, 1876; that its objects were illegal independently of the Trade Union Act, 1871, and that s. 4 of that Act prevented the Court from directly enforcing the agreement between the members:

Held, also, that by granting the injunction the Court would be directly enforcing the agreement.

The injunction was accordingly dissolved.

Rigby v. *Connol*, (1880) 14 Ch. D. 482, followed.

That case is not inconsistent with and has not been impeached by *Swaine* v. *Wilson*, (1889) 24 Q. B. D. 252. CHAMBERLAIN'S WHARF, LIMITED *v.* SMITH - - - **C. A. 605**

TRANSFER—Debentures—Winding-up—Judgment—Right to registration - 149
See COMPANY. 3.

TRANSLATIONS—Foreign documents—Solicitor Costs—Administration - - 251
See SOLICITOR. 3.

TRUST—*Resulting Trust—Fund raised by Subscription for Maintenance of Individuals—Death of Objects of the Fund—Unapplied Surplus—Resulting Trust for Subscribers.*

Where a fund was raised by subscription for the maintenance and support of two distressed

TRUST—*continued.*

ladies, and, at the death of the survivor of them, a portion of the fund remained unapplied:—

Held, that there was a resulting trust of the balance of the fund for the subscribers thereto. *In re* TRUSTS OF THE ABBOTT FUND. SMITH *v.* ABBOTT - - - - **Stirling J. 326**

TRUSTEE—*Breach of Trust—Executor—Devastavit—Reliance on Solicitor—Relief from Liability—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-s.* 1.

During five years' administration of a testator's estate by the Court, the executors, who knew that large sums were necessary for the payment of debts, disbursements, and other administration purposes, paid various sums from time to time to their solicitors in reliance on their statements that these sums were in each case required for those purposes, to which they were in fact in great part applied. Shortly before the close of the administration the solicitors became bankrupt, and, the total amount paid to them being substantially in excess of the amount required and applied for administration purposes, the balance was lost to the estate:—

Held, under the special circumstances, that the executors had acted honestly and reasonably, and ought fairly to be excused for making the payments in reliance on their solicitors' statements, and ought to be relieved from personal liability in respect of the balance lost.

Bacon v. *Bacon*, (1800) 5 Ves. 331; 5 R. R. 52, followed.

Observations on s. 3, sub-s. 1, of the Judicial Trustees Act, 1896. *In re* LORD DE CLIFFORD'S ESTATE. LORD DE CLIFFORD *v.* QUILTER. LORD DE CLIFFORD *v.* MARQUIS OF LANSDOWNE **Farwell J. 707**

2. —— *Investment—Convertible Securities—Bearer Bonds—Custody—Bankers.*

Where trustees are expressly authorized to retain or invest in convertible securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment by the bankers of the receipt thereof.

Field v. *Field*, [1894] 1 Ch, 425, distinguished. *In re* DE POTHONIER. DENT *v.* DE POTHONIER **Cozens-Hardy J. 529**

3. —— *Judicial Trustee — Appointment — Jurisdiction of Court—Official Trustee—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-ss.* 1, 3 — *Judicial Trustee Rules*, 1897, *r.* 23 (1).

Upon an application for the appointment of a judicial trustee in place of a retiring judicial trustee, if the Court is not satisfied of the fitness of the person nominated by the applicant, there is jurisdiction to appoint a person suggested by the retiring trustee as his successor, and the Court is not in such a case bound by sub-s. 3 of s. 1 of the Judicial Trustees Act, 1896, to appoint only an official trustee.

Decision of Kekewich J. affirmed. DOUGLAS *v.* BOLAM - - - - **C. A. 749**

4. —— *Remuneration — Will — Power to*

TRUSTEE—*continued.*

Charge for Professional Services—"Professional or other Charges"—Non-professional Services.

The testator directed that "any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate, and carrying out the trusts, powers, and provisions of this my will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person:—

Held, that this clause enabled a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course or not in the ordinary course thereof, but did not authorize him to charge for work done outside his profession or business. CLARKSON *v.* ROBINSON **Buckley J. 722**

5. —— *Retainer—Separation Deed—Trust of Leasehold Property in favour of Husband—Covenant by Husband to Pay Annuity to Wife—Default in Payment—Retainer of Trust Property to Satisfy Annuity—Deed—Construction—Recital—Implied Covenant.*

By a separation deed, after reciting that the husband and wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds, in the events which happened, in trust for himself, and he covenanted to make up the wife's income to 300*l.* a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, and in 1868 he was adjudicated a bankrupt. The trustees proved for arrears due down to the date of the bankruptcy, but there were further arrears due to them since that date. On the death of the wife the husband's assignee in bankruptcy claimed the leaseholds:—

Held, that a covenant by the wife to live apart ought to be implied from the recital; that consequently there was valuable consideration for the husband's covenant; and that the trustees were entitled to retain the leaseholds until the arrears were satisfied.

Semble, the right of trustees to retain trust property as against a beneficiary who owes money to them as trustees under the instrument creating the trust exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the Court. *In re* WESTON. DAVIES *v.* TAGART - - - **Stirling J. 164**

TRUSTEE—Appointment of person to exercise power of appointing new trustees — Jurisdiction of master - - **551**
See LUNACY. 2.

—— Indemnity, Right of—Purchase of land by trustee of settled estates — Entry by tenant for life—Non-payment of principal—Vendor's lien - - **736**
See VENDOR AND PURCHASER. 7.

UNCERTAINTY — Contract — Illegality — Remoteness—Statutory confirmation 352
See CONTRACT.

UNION—Trade union - - - 605
See TRADE UNION.

USER—Ancient lights—Evidence of intention to preserve—Interruption—Abandonment
See LIGHT. 2. 138

VENDOR AND PURCHASER—*Conditions of Sale—Clause excluding Compensation—Misdescription—Specific Performance—Possessory Title.*

The defendants sold by auction to the plaintiff a freehold property described in the particulars of sale as containing 5A. 0R. 26P., and as bordering on a lake on S. Common, the sale being subject to conditions of sale, one of which was as follows: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise . . . . and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof.

The only part of the property to which a good title was shewn contained 4A. 3R. Another part of the property offered for sale bordered on the lake, and as to this the only title offered was what purported to be a title by possession for less than forty years.

The plaintiff claimed rescission of the contract and a return of the deposit paid by him, and the defendants counter-claimed for specific performance:—

Held, that even if the defendants had established a possessory title to the border land for twelve years, that would not have been sufficient, as the contract, so far as it related to that land, was an open one, in which case a forty years' title by possession was required; that the defendants were not entitled to specific performance in respect of the part of the property to which a good title had been shewn; and that the plaintiff was entitled to rescission of the contract and the return of his deposit.

The authorities as to compensation conditions reviewed. JACOBS *v.* REVELL - **Buckley J. 858**

2. —— *Contract, Repudiation of, by Purchaser—Purchase-money payable by Instalments—Omission to pay last instalment—Right of Vendor to retain Instalments paid—Specific Performance—Damages.*

The defendant in August, 1892, agreed to sell some land to the plaintiff for 150*l.*, of which 40*l.* was paid at the time, and the balance was to be paid by twelve equal quarterly instalments of 9*l.* 3*s.* 4*d.* each. In case of default for thirty days in the payment of any instalment, the whole of the unpaid instalments were to become immediately due and payable, and, in the event of default for thirty days in payment, the vendor was to be at liberty to resell the land, and to retain out of the proceeds of sale the unpaid instalments with interest, and was to pay the balance to the purchaser.

The purchaser went into possession under the contract, and retained possession for a considerable time, and, though generally in arrear with the instalments, he had by August, 1895, paid them all, except the last. The last instalment became due on September 29, 1895, but it was never paid. Correspondence took place, in which the vendor called on the purchaser to pay, but he never gave him notice that, if payment was not made within a specified time, he should treat the contract as abandoned. In October, 1896, the purchaser went away, and the vendor was unable to find him. The vendor resumed possession of the land and endeavoured to sell it, but without success, and in March, 1898, he agreed to let it for three years to a tenant, who took possession. In June, 1898, the purchaser reappeared, and wrote to the vendor that he was prepared to pay the final instalment. In July, 1898, the purchaser commenced an action against the vendor, claiming specific performance of the agreement of August, 1892, and damages in lieu of or in addition to specific performance:—

Held, that the plaintiff's conduct did not amount to a repudiation of his contract, and that the vendor was not justified in treating the contract as abandoned, and that, though the purchaser was not entitled to specific performance of his contract, he was entitled to damages, which the Court assessed at 125*l.*

Decision of Cozens-Hardy J., [1899] 2 Ch. 710, reversed. CORNWALL *v.* HENSON - **C. A. 298**

3. —— *Contract, Validity of—Question arising out of Contract—Conveyance, Form of—General Words—Parcels—Summons—Specific Performance—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2.

Although upon a summons under s. 9 of the Vendor and Purchaser Act, 1874, evidence is adduced tending to throw a doubt upon the existence or validity of the contract itself, that does not preclude the Court from deciding on the summons a specific question arising out of or connected with the contract as it stands, such as a question with regard to the vendor's right to limit, in the conveyance, the operation of the general words in s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881. It is the duty of the Court to deal with such a question on the summons, irrespective of the question whether the contract is one that can be enforced or not. *In re* HUGHES AND ASHLEY'S CONTRACT
C. A. 595

4. —— *Lien—Unpaid Purchase-money—Vendor's Lien—Personalty—Share of Proceeds of Sale—Lunacy—Lunatic not so found—Appointment of Receiver—Rights of Third Parties—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

A vendor of personal estate is entitled to a lien for unpaid purchase-money on the property sold, e.g., when that property is a share of the proceeds of sale of leasehold property held by the trustees of a will upon trust for sale and division of the proceeds among specified persons.

An order in Lunacy, under s. 116 of the Lunacy Act, 1890, authorizing a person therein specified in the name and on the behalf of the lunatic to receive and give a discharge for all

VENDOR AND PURCHASER—*continued.*

sums of money due to him, does not affect rights enforceable against the lunatic's property at law or in equity (such as a vendor's lien for unpaid purchase-money), previously acquired by third persons.

Such an order deals only with the lunatic's equitable interests in his property.

In re Winkle, [1894] 2 Ch. 519, explained and distinguished. DAVIES *v.* THOMAS - **C. A. 462**

5. —— *Principal and Agent—Instructions to Sell—Real Estate—Authority to Sign Contract—Specific Performance.*

Instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, are an authority to the agent to make a binding contract, including an authority to sign an agreement for sale. ROSENBAUM *v.* BELSON - - - - **Buckley J. 267**

6. —— *Rescission of Contract—Town Property—Local Authority—Notices to Pave, &c.—Service of Notices on Vendor before Sale—Non-disclosure to Purchaser—Fraudulent Intent, Absence of—Execution of Works by Local Authority—Expenses—Charge on Premises—Outgoings—Particulars of Sale—Conditions of Sale—"Omission in Particulars"—Compensation—Misleading Condition—Caveat Emptor—Specific Performance—Rescission—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 150, 257.

The omission by a vendor, without fraudulent intent, to disclose, before sale, to the purchaser of town leasehold property the fact that he, the vendor, had been served by the local authority with the usual notices under the Public Health Act, 1875, to pave, &c., the street fronting the premises, is not such an "omission in the particulars" tending to depreciate the value of the property as to entitle the purchaser, if he completes his purchase, to compensation under the usual general condition, where the works are not executed by the local authority, and the expenses thereof do not therefore become a charge on the premises, until after the completion of the purchase.

But whether such an omission on the part of the vendor, even though without fraudulent intent, would have afforded the purchaser sufficient ground for resisting specific performance of his contract, or for an action for rescission, *quære.*

A condition of sale indemnifying the vendor against expenses "in complying with any requirement enforceable against him and made after the sale by the local authority in respect of paving, &c., the streets" is not such an implied statement that no requirement has been made by the local authority before the sale as to entitle the purchaser to relief on the ground of deception on discovering that notices under the Public Health Act, 1875, had been served on the vendor before the sale. *In re* LEYLAND AND TAYLOR'S CONTRACT - - - - **C. A. 625**

7. —— *Specific Performance—Purchase of Land by Trustee of Settled Estates—Entry by Tenant for Life—Payment of Interest on Purchase-money—Non-payment of Principal—Remedy against Owners of Estates—Trustee's Right of Indemnity—Subrogation—Vendor's Lien.*

In 1873 the vicar of a parish, with the consent of the patron of the living and the approval of the Ecclesiastical Commissioners, contracted, under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, to sell the glebe land of the vicarage for 24,963*l.* to the trustee of a will by which estates were devised in strict settlement. The then tenant for life and the Commissioners were parties to the contract. Under the will the trustee held the testator's personal estate upon trust for investment in the purchase of land to be settled to the same uses as the settled estates. The title was accepted, and the tenant for life, with the approval of the trustee, entered into possession of the glebe land and paid the vicar interest on the purchase-money, and this payment was continued by successive tenants for life to the vicar and his successor until 1896, the purchase-money not having been paid. At the date of the contract the trustee had no trust funds under his control available for the payment of the purchase-money, the whole or nearly the whole of the testator's personal estate remaining after investments in land having been advanced upon the security of policies of insurance upon the life of the third tenant for life of the estates, who did not die till many years afterwards. In 1896, the purchase-money not having been paid, the Commissioners brought an action, against the then tenant for life, the personal representatives of the trustee who had entered into the contract, and the then trustees of the settled estates, for the specific performance of the contract, or for an account and a declaration that the plaintiffs were entitled to a vendor's lien on the land sold and the enforcement of the lien. The then vicar was made a defendant, and the then tenant in tail was afterwards added as a defendant. The glebe land had become of much less value than the price agreed to be given for it. The estate of the trustee who had entered into the contract had been distributed after proper statutory advertisements. The estates had been disentailed and resettled, and the money secured by the policies had been also disentailed, and had been distributed by the trustees of the resettlement among the persons entitled thereto:—

Held, that, the contract for the purchase of the glebe land having been made at a time when the trustee had no funds under his control available for the payment of the price, and it being uncertain what the value of the land might be at the time when he would be in a position to pay for it, the contract was a speculative one not authorized by the trust for investment in land; that consequently the trustee had no right to an indemnity out of the settled estates, and that the plaintiffs had therefore no right by subrogation; that the plaintiffs had no remedy against the owners of the settled estates; and that their only remedy was by a lien for the unpaid purchase-money upon the land sold.

Decision of Byrne J., [1899] 2 Ch. 729, affirmed. ECCLESIASTICAL COMMISSIONERS *v.* PINNEY - - - - - **C. A. 736**

VENDOR AND PURCHASER—*continued.*

8. —— *Unwilling Purchaser—Qualified Covenant against Assignment — Lessor's Consent—Unreasonable Refusal.*

The vendor was the lessee of a public-house. The lease under which the property was held contained a covenant against assigning without the consent of the lessor, with the usual qualification as to refusal in the case of a respectable and responsible tenant.

The vendor agreed to sell the property to the purchasers, who were brewers, under an open contract. The lessor refused to give his consent to the assignment, stating that the main ground of his objection was that he desired the house to remain a free house:—

Held, upon summons taken out by the purchasers asking for a declaration that a good title had not been shewn, that the title was not one which could be forced upon an unwilling purchaser. *In re* MARSHALL AND SALT'S CONTRACT Byrne J. 202

—— Expressed grant of fee—Leasehold title in equity - - - - 635
See MERGER. 2.

—— Firm name—Conveyance of freehold shop—Vendor's name over door — Vendor's right to erasure - - - 698
See PARTNERSHIP. 1.

VESTING ORDER — Jurisdiction of master — Appointment of person to exercise power of appointing new trustees - 551
See LUNACY. 7.

—— Lunacy—Stock—Form of judgment - 15
See CONFLICT OF LAWS. 1.

VOLUNTARY ASSOCIATION—*Clifford's Inn—Inn of Chancery—Failure of Objects—Charity.*

By an indenture of feoffment of March, 1618, a messuage and premises known as Clifford's Inn was assured to certain members of the society, as trustees, in consideration of 600*l.*, with a declaration that the true intent and meaning of the deed was, that the said messuage "shall for ever hereafter retain and keep the same usual and ancient name of Clifford's Inn and shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of that society and for the benefit of the Commonwealth as aforesaid, and not otherwise, nor to any other use, intent or purpose." The property had long been dealt with by the society as its own, and for its own purposes, and the surviving members of the society contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit:—

Held, that the deed of 1618 negatived the idea of private ownership, and proved a dedication to public or charitable objects, and that the property now vested in the present trustees must be held by them upon trust for charitable purposes. SMITH *v.* KERR Cozens-Hardy J. 511

VOLUNTARY CREDITOR—Insolvent estate
See ADMINISTRATION. 7. 676

VOLUNTARY WINDING-UP—Wishes of creditors—Compulsory order — Discretion of Court - - - - 254
See COMPANY. 17.

WAIVER—Covenant to build—Repairs—Notice of breach—Sufficiency—Relief against forfeiture - - - - 156
See LANDLORD AND TENANT.

WASTE—Mining lease—Tenant for life impeachable for waste—Open mines—Proportion of rent to be capitalised - - 804
See SETTLED LAND. 4.

WIDENING STREETS—Power to take part of house—Metropolis management 794
See LONDON.

WIFE.
See Cases under HUSBAND AND WIFE.

WILL — *Accumulations — Trust to Accumulate Income beyond Twenty-one Years — Intestacy — Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98).

A testator devised and bequeathed his estate and effects to trustees, upon trust to pay out of the income thereof an annuity of 200*l.* to his niece during her life, and he directed that the surplus income of his trust estate should accumulate and be invested until the death of his niece, and, subject and without prejudice to the trusts aforesaid, his trust estate should be held in trust for the children of his niece living at his decease, or born afterwards, who should attain twenty-one, or who dying under that age should leave issue living at his or her decease, if more than one in equal shares; and in case there should be no such issue of the niece then, subject and without prejudice to the trusts aforesaid, after her death and the failure of her issue, as to one-third of his trust estate the same should be held in trust for some cousins named in the will, and as to the other two-thirds the same should be held in trust for the trustees of a charity:—

Held, that as to the surplus income from the expiration of twenty-one years after the testator's death down to the death of the niece there was an intestacy.

Weatherall v. *Thornburgh*, (1878) 8 Ch. D. 261, is not inconsistent with and has not been overruled by *Wharton* v. *Masterman*, [1895] A. C. 186.

Held also, on the construction of the will, that the persons who should become on the death of the niece entitled to the trust fund would become entitled also to the accumulations of the surplus income during the period of twenty-one years from the death of the testator. *In re* TRAVIS. FROST *v.* GREATOREX - C. A. 541

2. —— "*Die Unmarried*"—*Construction of Will.*

The primary meaning of "die unmarried" in a will is "die without having been married"; but the expression is flexible.

The phrase "if he shall die unmarried and without leaving a child" held equivalent to "if he shall die without leaving a widow or child." *In re* CHANT. CHANT *v.* LEMON Cozens-Hardy J. 345

WILL—*continued.*

3. —— *Evidence—Admissibility—Ambiguity—Equivocation—Legatee's right of Selection—Direct evidence of Intention—Construction of Will.*

A testatrix by her will gave "my 140 shares in the Crown Brewery Company" to trustees, upon trust to pay the income thereof to the plaintiff for her life, with remainder in trust for her children, and, if she should die without leaving issue, in trust to divide the same equally between the six defendants, as tenants in common. Two of the defendants were residuary legatees under the will. At the date of the will and at the date of the death of the testatrix she had 280 5*l.* shares in the company, of which forty were paid up in full, and the other 240 were paid up to the extent of 2*l.* 10*s.* per share. An affidavit by the solicitor who had prepared the will was tendered, to shew that the testatrix intended to bequeath 140 of her partly paid-up shares on the above trusts:—

Held, by Kekewich J. and by the Court of Appeal, that this evidence was not admissible;

Held, by the Court of Appeal, reversing the decision of Kekewich J., that the tenant for life was not entitled to select which of the 280 shares she would take:

But *held*, on the construction of the will, and having regard to the circumstances, that the bequest must be satisfied out of the 240 partly paid shares.

Tapley v. *Eagleton*, (1879) 12 Ch. D. 683, and *Asten* v. *Asten*, [1894] 3 Ch. 260, considered. *In re* CHEADLE. BISHOP *v.* HOLT - **C. A. 620**

4. —— *Hotchpot Clause — Money owing for Rent—Landlord and Tenant—Set-off—Rent, Non-payment of—Adverse Possession—Absolute Title of Tenant — Extinguishment of Landlord's Title—Construction of Will—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

A testatrix gave her property among her four children, and directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had, in the lifetime of the testatrix, acquired an absolute title, under s. 1 of the Real Property Limitation Act, 1874, to a freehold farm which had been let to him by her, through non-payment of rent by him to her for more than twelve years. Upon the question whether the unpaid rent for the twelve years prior to the extinguishment of the estate of the testatrix in the farm ought to be deducted from the son's share:—

Held, by the Court of Appeal, reversing the decision of North J., [1900] 1 Ch. 292, that, under the Real Property Limitation Acts, 1833 and 1874, all the rights of the reversioner in the farm had become extinguished, and that therefore the unpaid rent was no longer owing to her estate, and should not be deducted from the son's share. *In re* JOLLY. GATHERCOLE *v.* NORFOLK **C. A. 616**

5. —— *Lapse—Settlement of Shares—Construction of Will.*

A testatrix gave her real and personal estate to trustees upon trust for sale and conversion, and after payment of debts and legacies, "in trust for my said three daughters in equal shares"; the trustees were then directed to retain the share of each daughter upon trust to pay the income to each daughter for life, to her husband for life, and then for her children in the usual way, and in default of children who should attain a vested interest, in trust for the other daughters in equal shares, but so that the share so accruing should be subject to the same trusts as those declared concerning her original share. One of the daughters having predeceased the testatrix without issue, but leaving a husband:—

Held, that the share of the deceased daughter had not lapsed, and the husband was entitled to receive the income during his life, and subject to this—that it accrued for the benefit of the other daughters, their husbands and children.

In re Pinhorne, [1894] 2 Ch. 276, followed. *In re Roberts*, (1885) 30 Ch. D. 234, distinguished. *In re* POWELL. CAMPBELL *v.* CAMPBELL - - **Cozens-Hardy J. 525**

6. —— *Legacies — Bequest of Pecuniary Legacies — Bequest of "Residue and Remainder" of Specific Mortgage Debts—Intestacy—Undisposed of Personal Estate acquired between Dates of Will and Death — Administration — Legacies, Specific or Demonstrative — Fund applicable for Payment — Ambiguity — Intention — Extrinsic Evidence, Admissibility of—Evidence dehors the Will—Construction of Will.*

A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding "and legacies"), to three persons named. At the date of the will the testator's personal estate consisted of the two mortgage debts, which were just sufficient for payment of the legacies (if payable thereout), debts, and funeral and testamentary expenses. Subsequently to the date of his will the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two mortgage debts, was not sufficient for payment of the debts, funeral and testamentary expenses, and legacies.

On an originating summons to ascertain in what order the assets should be applied:—

Held, by Stirling J., that "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies:

But *held*, on appeal, by Lord Alverstone M.R. and Collins L.J. (Rigby L.J. dissenting), that "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the general pecuniary legacies as well as of the debts, &c.:

Held, also, by the Court of Appeal, that the

WILL—*continued.*
general pecuniary legacies were specific, and consequently that the legatees of the residue of the mortgage debts—though they were, as was admitted, entitled, if any of the debts and funeral and testamentary expenses were paid out of the mortgage debts, to have the amount so paid recouped out of the undisposed of personalty—were not entitled to throw any part of the general pecuniary legacies upon the undisposed of personalty.

The admissibility of extrinsic evidence in aid of the interpretation of wills, discussed. *In re* GRAINGER. DAWSON *v.* HIGGINS - **C. A. 756**

7. —— *Specific devise — Residuary Devise—Gift of "all other my Freehold Messuages and Tenements"—Restriction as to Tenure—Construction of Will.*

A testator devised his freehold shop at W. to his son, and then devised to the plaintiffs "all other my freehold messuages and tenements at W. and elsewhere." The devise to the son having failed by reason of his having attested the will:—

Held, upon the authority of *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, that the second devise was not residuary, and that the freehold shop was not included in it.

The principle of *Springett* v. *Jenings*, L. R. 6 Ch. 333, applies as well to a restriction as regards tenure as to a restriction as regards locality. *In re* MASON. OGDEN *v.* MASON **Kekewich J. 196**

8. —— *"Testamentary Expenses"—Direction to Pay Testamentary Expenses of another Person—Costs of Administration on Intestacy—Costs of Action in Probate Division — Estate Duty — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2.

The expression "testamentary expenses" includes the estate duty in respect of the personal property of which the testator or other person whose "testamentary expenses" are referred to was competent to dispose at his death.

A direction for the payment of "testamentary expenses" may extend to the expenses of administration under an intestacy.

A testator by his will gave his residuary estate to trustees upon trust to convert and to invest the net proceeds and pay the income to his wife during her life; and after her decease he directed his trustees, after paying his widow's funeral and "testamentary expenses" and debts, to apply his residuary estate as therein mentioned. The testator's wife survived him, and signed a document which purported to be her will. After her death the plaintiff and her brother, who were in the same relationship to the widow and were her next of kin, disputed the will, and the brother brought an action in the Probate Division to have a grant of administration to the estate of the widow made to him. The Court pronounced against the alleged will, but made no order as to costs. Letters of administration to the widow's estate were subsequently granted to the plaintiff with the assent of her brother:—

Held, that the direction for payment of the "testamentary expenses" of the testator's widow

WILL—*continued.*
extended to (1) the costs and expenses of the plaintiff in obtaining the letters of administration, and in connection with the administration of the estate of the widow; (2) the costs of the brother of the action in the Probate Division; and (3) the estate duty payable on the death of the widow in respect of her personal property. *In re* CLEMOW. YEO *v.* CLEMOW - **Kekewich J. 182**

9. —— *Testamentary Expenses, Direction to pay — Estate Duty—Incidence—Will in exercise of Power of Appointment — Appointed Fund—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor as such; consequently, the estate duty in respect thereof (in the absence of any direction in the will to the contrary) is payable out of the fund; but such estate duty falls within the description of testamentary expenses; consequently, where the will contains a direction to pay testamentary expenses out of the residue, the estate duty in respect of the fund is payable out of the residue. *In re* TREASURE. WILD *v.* STANHAM **Kekewich J. 648**

—— Contingent legacy — Contingent annuity—Settlement estate duty—Incidence **873**
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—— Nuncupative will—Validity - - **812**
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—— Trustee—Power to charge for professional services — "Professional or other charges"—Non-professional services
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—— Members — Building Society—Winding-up—Priority—Deceased member - **819**
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WORDS—"Clerk or servant" - - **349**
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—— "Die unmarried" - - - **345**
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—— "Exercise" - - - - **659**
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WORDS—*continued.*

—— "First refusal" - - - 352
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—— "House" - - - - 388
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—— "Invented word" - - - 238
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—— "Private Residence" - - - 388
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WORDS—*continued.*

—— "Residue and remainder" - - 756
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—— "Servant" - - - - 349
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—— "Solicitor" - - - - 425
See MORTGAGE. 3.

—— "Testamentary expenses" - - 182
See WILL. 8.

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